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dismissed
A-30789 4-12-67

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Mining Claims: Patents - Placer Claims 3470

An application for patent of a placer mining claim is properly rejected where the description of the land sought is not supplied in the manner contemplated by law and regulation.

Lawrence L. Lyons et al., Sacramento 078904 (January 9, 1967)

1-5-67

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 JAN 30 AM 10 00

In reply refer to:
704
Sacramento 078904
January 9, 1967

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

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DECISION

Lawrence L. Lyons :
: Mineral Patent Application
Doris R. Lyons :
: Decision Affirmed

Lawrence L. and Doris R. Lyons have appealed from a Sacramento land office decision dated July 19, 1965, which rejected their mineral patent application for the Carr-Joseph placer mining claim situated in the SE¼ of Sec. 1, T. 32 N., R. 10 W., M.D.M., Trinity County, California. The decision recited that from the application and other material in the record, it is not possible to accurately ascertain the acreage to be included in the patent application and the location of the areas to be excluded. The decision noted that the rejection was not in prejudice of the right of the applicants to again file an application for patent when the lands embraced in the mining claim can be described either by legal subdivision or when the areas to be excluded are delineated by an approved mineral survey.

The appellants contend that it is possible to accurately ascertain the acreage to be included in the patent application and the location of the areas to be excluded, asserting that on an aerial photograph of the area involved in the Bureau's office at Redding, California, the boundaries of the Carr-Joseph claim are marked and from that photograph it is a simple matter to delineate any area accurately. It is further asserted that there is a survey map of the claim as of November 1958, and that any Bureau field representative could establish the exclusions. On appeal it is stated that the area for which patent is sought would be 14½ acres more or less.

The patent application described the mining claim as being located in S½S½NE¼SE¼ or Lot 6 (now described as Lots 13, 14, SW¼SW¼NE¼SE¼) and the N½SE¼SE¼ (now shown on the records as portions of Lots 16 and 22 and Lots 15 and 23, NE¼SE¼SE¼) Sec. 1, T. 32 N., R. 10 W., M.D.M., California, containing 29 acres more or less. The patent application, as amended, lists for exclusion six parcels of land, five of which are only identified by acreage, name of grantee, date of execution of conveyance and the date and place of recording thereof. The appellants in a letter dated January 12, 1965, stated that they wish to withdraw from their mineral patent application that portion of the mining claim declared null and void in Contest No. 5637 (United States v. Earl F. Ford).

The mining laws provide that:

> Claims usually called "placers," . . . shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands. And where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the 10th day of May 1872, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys, . . .; but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands . . . . (30 U.S.C. § 35 (1964)).
>
> Legal subdivisions of forty acres may be subdivided into ten-acre tracts; . . . although such claims may be less than ten acres each, ... (30 U.S.C. § 36 (1964)).

The regulations provide that placer claims

> . . . shall conform as near as practicable with the United States system of public-land surveys and the rectangular subdivision of such surveys, whether the locations are upon surveyed or unsurveyed lands. (43 CFR 3416.5(a)).

The regulations explain the manner of describing a 10-acre subdivision and provide:

> . . . in addition to this description, the notice must give all the other data required in a mineral application, by which parties may be put on inquiry as to the land sought to be patented. . . . (43 CFR 3416.4).

The regulations further provide in regard to placer mining claim patent applications that:

> . . . where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands. (43 CFR 3470.1).

The aerial photograph to which the appellants refer is not an official plat of survey of the area involved. Moreover, it is required that a placer mineral patent applicant describe the land sought by legal subdivision or aliquot parts thereof (which includes lottings), if surveyed, and where the placer claim cannot be conformed to legal subdivision or aliquot parts then a survey and plat is required. While the appellants on appeal have stated that the area for which patent application, as amended, is made embraces 14½ acres more or less, they have not furnished a description which in the manner contemplated by law and regulation, identifies the boundaries of the mining claim for which application for patent is made. See Snow Flake Fraction Placer, 37 L.D. 250 (1908).

Accordingly, the decision appealed from, which rejected appellants' mineral patent application for lack of an adequate land description, is affirmed.

The appellants are allowed 30 days from the date of receipt of this decision within which to further amend their patent application by the submission of a description by aliquots parts of legal subdivisions describing the lands sought for patenting, if they can be so described. Otherwise, the appellants have the right, without prejudice, to again file a mineral patent application, after there has been an approved mineral survey of the claim made at their own expense.

Mr. and Mrs. Lyons are also allowed the right of appeal to the Secretary of the Interior within 30 days of receipt hereof in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellants will have the burden of proving wherein the decision appealed from is in error.

Frances A. Patton
Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
Mr. and Mrs. Lawrence L. Lyons (Certified Mail)
Div. of L&M S&T (4)
Div. of L&M PM (2)
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Gower Federal Service
Appeals List No. 1
WHW

appeal to Sec.

Affirmed
A-30784
7-16-68

DOCKET FILES

Mining Claims: Discovery 3413

Mining claims are properly declared null and void for lack of discovery of valuable mineral deposits when the evidence discloses that only low values of gold and other minerals are present on the claims.

A mining claimant may be justified in doing further exploratory work in the hope of finding valuable minerals, but exploratory work is not discovery. Exploratory work is that which is done prior to a discovery in an effort to determine whether the land contains valuable minerals. It is only when the exploration work shows that minerals exist in such quantities and such values that there is a reasonable prospect of success in developing a paying mine that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made.

United States v. Walter L. Bossard, et al., Riverside Contest No. 04880
(January 23, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 FEB 3 AM 10 00 ②

In reply refer to:
704
Contest No. 04880
(Riverside)
January 23, 1967
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UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

DECISION

United States, Contestant v. Walter L. Bossard and Thelma M. Bossard, Contestees	:	Bossard #1 through #24, inclusive, lode mining claims situated in Secs. 35 and 36, T. 3 N., R. 3 W., and Secs. 1 and 2, T. 2 N., R. 3 W., S.B.M., California

Decision Affirmed

The above-named contestees have appealed from a decision of a Hearing Examiner dated August 30, 1965, which declared their Bossard #1 through #24, inclusive, lode mining claims null and void for the reason that there had not been a discovery of a valuable mineral deposit within the purview of the mining laws within any of the claims.

The contest proceeding was initiated on behalf of the United States at the request of the Regional Forester (San Francisco, California), Forest Service, United States Department of Agriculture, by the filing of a complaint alleging (a) that a discovery of a valuable deposit of a locatable mineral does not presently exist within the limits of the claims, and (b) that the land included within the claims is nonmineral in character. The contestees filed a timely answer denying the allegations and a hearing was held at San Bernardino, California on February 3, 1965. At the hearing the contestant was represented by the Office of the General Counsel, United States Department of Agriculture, San Francisco, California, while the contestees appeared personally and were represented by counsel.

The case record discloses that the Bossard #1 through #24, inclusive, lode mining claims were located between March 23 and June 14, 1965. 1/ None of the location notices makes any mention of the mineral for which the claim was made. The claims are within the San Bernardino National Forest, approximately 2 miles northeast of Lake Arrowhead. The surface of the claims is overlain with deposits of stone, gravel and decomposed granite, all of which are placer materials. The Hearing Examiner correctly excluded evidence relating to the placer deposits from the hearing as discovery of a placer material will not sustain a lode location, citing United States v. El Portal Mining Co., 55 I.D. 348 (1935).

1/ The Hearing Examiner's decision shows the dates of location as "April 25 - June 30, 1955". The dates of recording are April 5 - June 30, 1955.

Following a thorough review and study of the case record, we find that the Hearing Examiner briefly but adequately summarized the pertinent facts adduced at the hearing. We find it sufficient merely to restate these salient points from his decision.

The contestant's case was presented through the testimony of Mr. Emmett B. Ball, Jr., a mining engineer employed by the United States Forest Service. Mr. Ball had examined all of the claims on several occasions, accompanied sometime by the claimant, Walter L. Bossard, alone, and sometime by Mr. Bossard and his technical advisor. Mr. Ball took samples at the sites suggested by Mr. Bossard as well as in cuts and other sites which he felt justified sampling. The samples were assayed and also subjected to spectrographic analysis. The most favorable sample from an iron-stained spot in the Bossard #9 mining claim assayed $4.11 per ton in gold and silver (Sample #935, Exh. 11). Mr. Ball estimated the smelter charge for this type ore would be approximately $9.00 per ton. All other samples taken by Mr. Ball showed nominal or inconsequential values for gold and silver. The spectrographic analyses of the samples showed no significant mineralization. The engineer concluded that a prudent man would not be justified to expend money expecting to develop a mine on these claims or on any of them. Mr. Ball described the underlying substrata on the group of claims as primarily a granitic rock which had been intruded by dikes of pegmatite with crystals of quartz and feldspar and containing spots of tactite, this latter material sometimes indicating the presence of tungsten. There also was some dolomitic rock amid the granitic rock.

The contestees' case was presented through the testimony of Mr. Fred B. Greusel, Ph.D., a chemist and mining geologist, and of Mr. Walter L. Bossard, one of the contestees. Mr. Greusel testified that he had been on the claims one time in 1958, taking 2 samples, with the one from the Bossard #2 mining claim being the more favorable. He stated his recollection that this sample assayed $2.80 per ton in gold, and he submitted a chemical analysis certificate he prepared in 1959 to substantiate his statement. He stated there were ledges of dikes of pegmatite on the claims but he did not see any quartz vein within the group of claims although there are such quartz veins in the area. Mr. Greusel stated that he had received a sample of rock from Mr. Bossard for analysis, which he determined contained 15% beryllium, and he testified that a large body of 15% beryllium ore could be commercially developed.

Mr. Walter L. Bossard, testifying in his own behalf, stated that he had prospected the claims with a dark light and had found fluorescence in the area of Bossard #17 through #24, inclusive, mining claims, which he suggested was a strong indication of scheelite, a tungsten ore. Mr. Bossard also alleged he had seen veins or lodes showing gold and "quartzite" in Bossard #1 through #10, inclusive, mining claims, and asserted his belief that there are valuable minerals in the area of the claims.

The following legal principles govern with respect to the pertinent facts adduced at the hearing.

The location of "valuable mineral deposits" in lands belonging to the United States is authorized by the mining law. 30 U.S.C. § 22 (1964). Although such deposits are not defined in this law, the Department, with judicial approval, has consistently adhered to the definition of value laid down in *Castle* v. *Womble*, 19 L.D. 455, 457 (1894); *Best, et al.* v. *Humboldt Placer Mining Company*, 371 U.S. 334 (1963), that minerals must be found and the evidence must be of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. In the case of a lode claim the elements necessary to establish a valid discovery are (1) that there must be a vein or lode of quartz or other rock in place, (2) that the quartz or other rock in place must carry gold or some other valuable mineral deposit, and (3) that the two preceding elements when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in an effort to develop a valuable mine. *Jefferson-Montana Copper Mines Co.*, 41 L.D. 320 (1912).

The discovery required by the mining laws means more than a showing only of isolated bits of mineral not connected with or leading to substantial values. *United States* v. *John L. Cooper, et al.*, A-30267 (May 11, 1965). The contestees may be justified in performing further exploratory work in the hope of finding valuable minerals, but exploratory work is not discovery. As the Department said in the *Cooper* case, *supra*, "The Department has held that there is a distinct difference between exploration and discovery under the mining laws. Exploratory work is that which is done prior to discovery in an effort to determine whether the land contains valuable minerals. It is only when the exploratory work shows that minerals exist in such quantities and such values that there is a reasonable prospect of success in developing a paying mine that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery had been made. *United States* v. *Clyde R. Altman and Charles M. Russell*, 68 I.D. 235 (1961)."

From the evidence submitted the Hearing Examiner concluded that the contestees' mining claims were null and void for lack of discovery. He held that the Government met its burden by establishing a *prima facie* case as to the invalidity of all the mining claims, and that the contestees failed to prove the validity of any of the claims by a preponderance of evidence, as required by *Foster* v. *Seaton*, 271 F. 2d 836 (D.C. Cir. 1959).

The appellants contend, in essence, that the official land office records reflect the mineral character of the land within their claims; that they have made discovery of valuable minerals within the definition of that term prior to P.L. 167 [Act of July 23, 1955 (69 Stat. 367)] and that the claims having been located prior to P.L. 167, the element of commercial value as a condition of discovery should not be applied to these claims; and that a geologist, Mr. Fred B. Greusel, had testified as an expert witness that a prudent man would be justified in continued exploration. The appellants requested permission to enter into the record an Observation and Sampling Survey executed February 8, 1958 by Mr. Fred B. Greusel, explaining that it was overlooked at the time of the hearing because of physical incapacity of Mr. Greusel.

The contestant did not reply to the statement of reasons for the appeal.

The appellants apparently have confused exploration with discovery. As stated in the Cooper case, supra, these terms are not synonymous. One may explore endlessly and not achieve a discovery, even though he may find traces of minerals which induce him into further exploration with hopes of someday making a discovery. A discovery must conform to the rule set forth in the Cooper case, supra. The suggestion of the appellants that because the claims have been taxed as real property discovery must have been made, following their interpretation of Wilbur v. United States, ex rel. Krushnic, 280 U.S. 306 (1930), is not sound. That decision is applicable only to mining claims perfected under the law (including discovery). It is not applicable in this instance, as none of the appellants' claims has been shown to have a discovery, and so none is perfected, or valid, under the law.

Looking now at the exhibit submitted with the appeal, it has been held that evidence submitted outside of the hearing cannot be used as a basis for decision on the merits of a case, but only to determine whether a further hearing should be held at which the evidence can be properly submitted. United States v. Ed & Leona Jaensch, A-30225 (April 29, 1965, footnote 1). As stated above, the hearing in this case was held February 3, 1965. The exhibit now tendered was in existence at the time of the hearing and presumably could have been offered in evidence at the hearing held. Thus it may not now be considered as a basis for a further hearing.

The low mineral values shown fail to establish that a discovery was made or existed on any of the Bossard #1 to #24, inclusive, lode mining claims.

Accordingly, the decision of the Hearing Examiner declaring the Bossard #1 through #24, inclusive, lode mining claims null and void is affirmed.

The Hearing Examiner did not rule on the charge in the contest complaint that the land was nonmineral in character. In light of his finding that all the mining claims are null and void, it is not now necessary to consider this charge. See C. Henry Bunte, 41 L.D. 520 (1913).

Mr. Walter L. Bossard and Mrs. Thelma M. Bossard are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land

Management, Washington, D.C. 20240. The filing fee will be computed on the basis of $5 for each lode mining claim included in the appeal. If the appeal covers all 24 lode mining claims adversely affected by this decision the total filing fee will be $120. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellants will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error. If an appeal is taken, the adverse party to be served is Regional Attorney, Office of the General Counsel, United States Department of Agriculture, Room 860, 630 Sansome Street, San Francisco, California 94111.

Newton Frishberg

Chief, Office of Appeals
and Hearings

Enclosures

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U. S. Department of Agriculture
Forest Service, Div. of Watershed Management (12)
Regional Forester, Forest Service, U.S. Department of Agriculture
Div. of L&M S&T (4)
Div. of L&M PM (2)
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Hearing Examiner Graydon E. Holt (Sacramento)
Administrative Assistant, Appeals and Hearings
Gower Federal Service
Appeals List No. 1
DEH

appeal to Sec. Affirmed A-30799, 11-2-67
cy in file

DOCKET FILES

Mining Claims: Verified Statements 3512.1

Where the date on which a mining claim was located as shown by the verified statement, filed timely under the act of July 23, 1955, is a date when the lands were within a power project, and so withdrawn from mining location, and it is alleged by the mining claimant on appeal from the rejection thereof that the claim was first located when the lands were open to mining entry, and where upon remand there is filed an amended verified statement with evidence which is unclear and inconclusive as to the mining location originally listed stemming from an earlier location and as to a showing of chain of title through it, the amended verified statement is properly rejected.

The correction or amendment of a timely-filed verified statement, after the time for filing has expired, is limited to matters incorrectly set forth therein, and the inclusion of additional or the substitution of other mining claims is not permitted.

An owner of an unpatented mining claim, who files a verified statement pursuant to the act of July 23, 1955, need not show that he is the owner of 100% of the title to the mining claim.

One who files a timely-filed verified statement is not relieved of establishing an ownership in the mining claim identified in his original verified statement, when called upon to do so, and he may not, after the filing period has expired, amend his verified statement by substituting a claim or claims in which he can show ownership.

Weeds Point Mining Company, Sacramento P.L. 57-6 (February 20, 1967)

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SACRAMENTO LAND OFFICE
1967 MAR 9 PM 2 44

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In Reply Refer to:
704
Sacramento P.L. 57-6

February 20, 1967

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DECISION

Weeds Point Mining Company : Verified Statement
: (Act of July 23, 1955)
:

Decision Affirmed, as Modified.

The Weeds Point Mining Company has appealed from a decision of the Sacramento land office, dated August 4, 1965, which rejected its amended verified statement because the mining claimant failed to furnish evidence which clearly and definitely establishes that the mining claims were located prior to the withdrawal of the lands for Power Project No. 187.

The mining claims covered by the verified statement originally filed and by the amended verified statement of the appellant are:

Verified Statement		Amended Verified Statement	
Claim	Located	Claim	Located
Rainy Day Quartz	(P) 4-17-29 1/		
Horse Valley No. 1	(P) 10-11-30	Horse Valley No. 1	(P) 12-24-09
Horse Valley No. 2	(P) 10-11-30	Horse Valley No. 2	(P) 12-24-09
Horse Valley No. 3	(P) 10-11-30	Horse Valley No. 3	(P) 12-24-09
Bull of the Woods	(P) 10-11-30	Bull of the Woods	(P) 12-24-09
Weeds Point Annex	(L) 3-14-32	Weeds Point Annex	(P) Patented
Big Rock Placer	(P) 8-9-40	Bull of the Woods	(L) Prior to 1922

The original verified statement of the appellant was timely filed pursuant to section 5 of the act of July 23, 1955 (30 U.S.C. § 613 (1964)). A land office decision of May 2, 1963, declared the mining claims listed in the original verified statement null and void and rejected the verified statement. The decision stated that the lands described in the mining claims location notices on the dates of location shown had been either patented or were withdrawn in 1922 and 1924 from entry or location under section 24 of the act of June 10, 1920, the Federal Power Act, (16 U.S.C. § 818 (1964)), for Power Project No. 187.

1/ This claim is closed. See footnote 1 of Bureau decision of September 18, 1963.

On appeal to the Director, Bureau of Land Management, the decision was reversed in part and the case remanded by a decision dated September 18, 1963, for the reasons (1) that after an unrestricted patent for public land has issued the legal title passes from the United States and the Department is thereafter without jurisdiction to determine rights in the patented land, and (2) that, since there was an assertion on appeal that the mining locations on public lands are relocations of earlier locations made when the lands were open to mining entry, under the ruling in the case of Mr. and Mrs. Ted R. Wagner, 69 I.D. 186 (1962), the mining claimant would be allowed a reasonable time within which to furnish evidence of the earlier locations of the claims and proof of a chain of title from those locations. Thereafter, a determination was to be made to allow or deny an amendment of the verified statement.

The mining claimant, in support of its amended verified statement, submitted to the land office certified copies of location notices and conveyances for the purpose of establishing earlier locations for the mining claims named in its original verified statement and a chain of title therefrom into the mining claimant.

The land office decision of August 4, 1965, from which this appeal has been taken, correctly explained that after a verified statement has been timely filed it could be corrected after the time for filing had expired only as to matters incorrectly set forth therein and that such an amended statement is restricted to the mining claims covered by the original.

Since the appellant expressly disclaims any interest in the Big Rock placer claim, the land office decision closing the case as to that claim constitutes the final administrative determination in that matter.

WEEDS POINT ANNEX

The decision below in referring to the Weeds Point Annex claim, located on March 10, 1932, described as embracing the E$\frac{1}{2}$SE$\frac{1}{4}$SW$\frac{1}{4}$ of Sec. 26, T. 19 N., R. 8 E., M.D.M., and shown on the amended verified statement as embracing only patented land, pointed out that the records of the land office show that except for that portion of Lot 37 in Sec. 26, patented in 1876, the balance of the SE$\frac{1}{4}$SW$\frac{1}{4}$ of Sec. 26, now described as Lot 1 of Sec. 26, is unpatented and was withdrawn for Power Project No. 187 on April 17, 1924. The decision rejected the amended verified statement as to the Weeds Point Annex claim on the basis that no evidence was furnished to establish that a location for that claim was made prior to the withdrawal of the land for power purposes.

On appeal, the appellant admits that its showing as to the Weeds Point Annex claim was that it was patented ground, which it asserts was based upon a title company report made in 1937, which in turn is claimed to have been based upon a 1936 letter from the land office. The appellant also maintains that it was not advised prior to the land office decision that the $E\frac{1}{2}SE\frac{1}{4}SW\frac{1}{4}$ of Sec. 26 was not all patented land.

We have verified the status of the lands described in the location notice for the Weeds Point Annex claim and find the facts stated in the land office decision relating to those lands to be correct. The Bureau of Land Management in its land offices maintains tract books and other records containing essential facts as they relate to the public lands. The public is chargeable with knowledge of the status of such lands as disclosed by those records. James C. Forsling, 56 I.D. 281 (1938). Moreover, reliance on erroneous information or advice furnished by an employee of a land office will not confer any right or interest that is not provided by law. Robert K. Foster et al., A-29857 (June 15, 1964). We concur with the rejection of the amended verified statement as to the Weeds Point Annex claim for the reason stated in the decision appealed from.

HORSE VALLEY NOS. 1, 2 and 3 (P) MINING CLAIMS

The appellant's statement in its amended verified statement and the contentions set forth in its statement of reasons for the appeal are substantially the same. They are that rights to the Horse Valley Nos. 1, 2 and 3 placer claims and the Bull of the Woods claim arise out of four mining claims locations along Horse Valley Creek made on December 24, 1909, by M. B. Turner, which were "known as the Horse Valley placer Mine or Turner Tailing Claims"; that one of them was renamed the Bull of the Woods; that these claims were conveyed through mesne conveyances to the appellant; and that each and all of the conveyances substantially describe and convey:

All Horse Valley Placer Mine
Nos. 1 and 2, Horse Valley Placer Claims
Turner Tailing Claim
Debris Dam, Horse Valley Creek
Lot 37 (Weeds Point Mine)
Horse Valley and Upper Weeds Point Ditch,
reservoir and improvements
Bull of the Woods Quartz Mine
Right of Way down Horse Valley Creek.

The land office decision appealed from pointed out that the deed executed on February 2, 1922, by Charles J. McCoy, Yuba County Commissioner, conveyed to W. J. Morgan the interest of the Horse Valley Mining Company in the Consolidated Willow Placer Mine comprised of the "Horse Valley Placer claim, Patented; the Protection Placer Mine, the Four Hundred Placer Mine and the Bull of the Woods Quartz Mine" and that these claims were referred to individually in the conveyance from W. J. Morgan to P. H. Sauter executed on February 7, 1922. It also pointed out that the conveyance from Harvey Eich, Tax Collector of the County of Yuba, to George W. Lischer, of the interest of Philip H. Sauter, executed July 30, 1930, designates the claims conveyed as "All Horse Valley Placer Mine, Lot 37, Protection Mine, 400 Mine, Bull of the Woods Quartz Mine, Horse Valley Creek and Turner Tailing Claim". It further noted that George W. Lischer et al. in turn conveyed on November 14, 1931, to the Weeds Point Mining Company "All Horse Valley Placer Mine, Lot 37, except 13½ acres. . . , Protection Mine; Four Hundred Mine; Bull of the Woods Quartz Mine; . . . Horse Valley Creek and Turner Tailing Claim". The decision below found that the evidence furnished does not establish that the conveyance of November 14, 1931, transfers to the appellant title to the mining claims located by Lischer, on October 4, 1930, named the Horse Valley placer and mining claim No. 1, the Horse Valley Dam and Tailings placer mining claim No. 2, and the Horse Valley tailing and right of way placer mining claim No. 3, as they were not listed therein.

Examination of the copies of the four location notices for the mining claims located by Turner in 1909, furnished by the appellant, discloses that Turner located claims to be known as the J. Stephens Placer Mining Claim, The J. Stephens Placer Mining Claim No. 2, the Turner Tailing Claim No. 1 Placer Mining Claim (formerly the Joe Stephens Tailing Claim), and the Turner Tailing Claim No. 2 Placer Mining Claim (formerly the Joe Stephens Tailing Claim). Neither the deed by McCoy to Morgan nor the deed by Morgan to Sauter mentions by name any of the Turner located mining claims; rather they name claims as stated in the land office decision of August 4, 1965. In the deed by Eich, conveying specified mining claims that were the property of Sauter to Lischer, there is first mention of a Turner Tailing Claim. It is again mentioned in the deed by Lischer to the appellant company. However, a description of the land it embraces is lacking and the source of Sauter's title to that claim is unexplained.

The Horse Valley Nos. 1, 2 and 3 (P) claims listed in the original verified statement and stated therein to have been located on October 11, 1930, and recorded in PE Book 6, at page 217 of the Yuba County records, are claims that were located on October 4, 1930 by George W. Lischer and others. The conveyance by Lischer et al. to the appellant executed in November 1931 does not name these three claims which were located the year previous. We find that the appellant has not furnished evidence of title to the Horse Valley Nos. 1, 2 and 3 claims as listed in its original verified statement. After the filing period has expired a verified statement may not be amended to include additional or to substitute other mining claims. The land office decision rejecting the amended verified statement as to the Horse Valley Nos. 1, 2 and 3 (P) claims is affirmed.

BULL OF THE WOODS CLAIM

The land office decision rejected the amended verified statement as to the Bull of the Woods (L) claim, wherein it was listed as both lode and placer claims. Originally it was listed as a placer claim. On appeal, it is asserted that the ground covered by the Bull of the Woods placer claim is the same as the Bull of the Woods lode claim and that it is both a lode and a placer claim. Where in fact the same ground is covered by placer and lode locations of the same name and it is shown to be owned by the same mining claimant, it will not be deemed to be an enlargement of the original verified statement. However, its acceptance, in the instant case, is conditioned upon such a showing and title stemming from a location predating the power project withdrawal. The record now shows that a quartz claim named the Bull of the Woods was located on October 6, 1930, by George W. Lischer and others. The conveyances discussed in this decision in relation to the Horse Valley Nos. 1, 2 and 3 placer claims identify a Bull of the Woods Quartz Mine. The oldest of the conveyances submitted which lists a Bull of the Woods Quartz Mine is dated February 2, 1922. It recites that the claims named therein are situated at Weeds Point in Slate Township in T. 19 N., R. 8 E., M.D.M. There is nothing in the record which describes the precise lands embraced by the Bull of the Woods Quartz Mine referred to in this and the other conveyances which could be used as a basis for determining where it is situated on the ground and whether it covers the identical ground of the Bull of the Woods claim listed in the original and amended verified statements.

The appellant asserts that the Bull of the Woods claim is located along Horse Valley Creek and that one of the mining claims located by Turner in 1909 was renamed the Bull of the Woods. In the light of the record in this case as now compiled these are merely self-serving statements which are insufficient to support such a finding. Therefore, the rejection of the amended verified statement as to the Bull of the Woods is affirmed, as modified.

Comment was made in the decision on the amended verified statement that it does not appear that the interests of certain co-locators with Lischer were transferred to the appellant. The appellant asserts that the transfer of the co-locators' interests is recorded. While such a document is not in evidence, it is not necessary in this instance for the reason that for the purpose of filing a verified statement one need only be an owner of the unpatented mining claims listed therein and his ownership in the claims need not be the whole title or 100 per cent.

The Weeds Point Mining Company is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers all mining claims adversely affected by this decision the total filing fee will be $25. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

Newton Frishberg

Chief, Office of Appeals and Hearings

Enclosures

DISTRIBUTION:

Weeds Point Mining Company (Certified Mail)
Mr. Wayne A. Fox, President of Weeds Point Mining Company
Regional Forester, Forest Service, United States Department of Agriculture,
San Francisco, California
Forest Service, Division of Watershed Management, United States Department
of Agriculture, Washington, D. C. (12)
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Gower Federal Service
Appeals List No. 1
WHW

appeal to Sec
affirmed & Remanded
A-30958 - 10-16-68

Mining Claims: Withdrawn Land 3400.1

Mining claims located on land segregated from such entry by an application for withdrawal noted on the official land records in the land office are null and void *ab initio* and confer no rights upon the locators.

Mining claims are properly declared null and void where the locations were made at a time when the land embraced in the claims was temporarily withdrawn from location under the mining laws.

Albert Gardini et al., S 685, etc. (February 2, 1968)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 FEB 8 AM 10 00

In reply refer to:
704
S 685
686
688
1090

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

February 2, 1968

CERTIFIED MAIL
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DECISION

Albert Gardini :
John Baldrica : Mining Claims
:

Decisions Affirmed

Messrs. Albert Gardini and John Baldrica have appealed from a decision of our Sacramento land office dated July 19, 1967, which declared their Bonanza I, II, III, #5, and #6 quartz mining claims null and void *ab initio* because the claims were located on land after it had been segregated from mineral location by posting of an application for withdrawal of the lands on the official tract book records of the land office, and from a decision dated November 8, 1967, which declared their Bonanza #4 quartz mining claim null and void *ab initio* for the same reason.

The appellants have directed their appeals only to the Bonanza I, II, #4 and #5, stating that they had abandoned the Bonanza III and #6 in 1957. They contend that there was no public notice of the proposed withdrawal and that the mining laws do not require claimants to check the land office records to discover availability of land. They assert that they constructed a road to the claims with the knowledge and permission of the Forest Service, and that the Forest Service had granted them annually a permit to use explosives in their assessment work on the mining claims. They contend the Forest Service should have given them notice when they applied for the blasting permits subsequent to 1954 if the lands were truly withdrawn from mining at that time. Finally, they suggest that the area in the mining claims is not susceptible of recreational use because of its rugged terrain and that it is valuable for the mining of tungsten.

The record shows that on August 17, 1954, the Forest Service, U.S. Department of Agriculture, made application Sacramento 048741 for a withdrawal of lands in the Sierra National Forest from all forms of disposal, including mining, for recreation areas, including, *inter alia*, the W½SW¼ section 4, SE¼, W½ section 5, E½, E½E½W½ section 6, N½ section 8, T. 6 S., R. 22 E., M.D.M., California. The land office tract books were noted on September 13, 1954, to reflect the application and that the lands were segregated from location and entry under the public land laws, including the United States mining laws. Notice of the application was published in 22 F.R. 7490 on

September 19, 1957. The requested withdrawal was effected by Public Land Order 3408, issued June 19, 1964, and published in 29 F.R. 8065, on June 25, 1964. The Order described the land withdrawn in T. 6 S., R. 22 E., M.D.M., as W½SW¼ section 4, lots 3, 4, S½NW¼, S½ section 5, lots 1, 2, E½ lot 3, S½NE¼, E½SE¼NW¼, E½E½SW¼, SE¼ section 6, SE¼NE¼ section 7, N½, N½SW¼, N½SE¼SW¼, W½NW¼SE¼, NW¼SW¼SE¼ section 8, and provides that the lands are withdrawn from prospecting, location, entry and purchase under the mining laws of the United States.

The record further shows that the subject mining claims were located apparently in W½SW¼ section 4, S½, S½NW¼ section 5, E½E½ section 6, N½N½ section 8, T. 6 S., R. 22 E., M.D.M., on the following dates: Bonanza I on May 20, 1955; Bonanza II on May 20, 1955; Bonanza #4 on June 9, 1955; and Bonanza #5 on June 9, 1955. Each claim was located after notation of the application for withdrawal of the located lands on the land office tract books.

At the time the application for withdrawal was filed, as well as when the claims were located, the regulations provided pertinently:

> The recording in the serial register and the noting on the official plats and in the tract books maintained by the land office for the area, * * *, of information indicating that an application for the withdrawal or reservation of lands has been received from a Federal or State agency shall temporarily segregate such lands from settlement, location, sale, selection, entry, lease, and other forms of disposal under the public land laws, including the mining and the mineral leasing laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal. 43 CFR 295.10(a).

(This section is now codified as 43 CFR 2311.1-2(a)).

Thus the subject lands were not open to mineral entry at the time the Bonanza group of claims was located, so the land office properly declared the Bonanza I, II, III, #4, #5, and #6 quartz mining claims null and void *ab initio*. No hearing is necessary to declare mining claims null and void *ab initio* where the records of the Department show that at the time of location of the claims the land was not open to such location because of a withdrawal. *Dorothy L. Benton*, A-30729 (May 31, 1967), *Ernest Smith*, A-29590 (August 2, 1963). A mining claim is properly declared null and void where the location was made at a time when the land embraced in the claim was temporarily withdrawn from location under the mining laws. *Ernest Smith*, *supra*.

The charge by the appellants that notice of the proposed withdrawal was not of record in Madera County, California, where the claims are situated, is not germane to the question before us. Mining claims are properly recorded in the county records of the county in which the mining claims are situated. However, official status of public domain lands is shown only on the public records maintained in the land offices of the Bureau of Land Management, which are the source of basic information as to Federal ownership and the availability of acquisition by the public of mineral rights in such public lands. The public is chargeable with knowledge of the status of the public lands as disclosed by those records. It is incumbent upon mining claimants to satisfy themselves that land they claim is in fact public land open to mining location. One who fails to inspect the public land records to determine whether the lands he claims are open to mining location is negligent at his peril. See James C. Forsling, 56 I.D. 281 (1938).

The legal effect of a withdrawal is determinate of the question of availability of land for mining entry, and the actual use to which the land has been put or for which it is or is not being presently used is immaterial. David W. Harper et al., 74 I.D. 141 (1967). There is no doubt that the lands in question here were in a segregated status, closed to mineral entry, at the time the subject mining claims were located. The claims, therefore, are void from their inception.

The Regional Forester, U.S. Department of Agriculture, in a letter dated December 7, 1967, asserts that the road to the subject mining claims was constructed in trespass and that no permit for its construction and maintenance has ever been granted by the Forest Service. He did acknowledge that blasting permits for S½ section 5, T. 6 S., R. 22 E., had been issued to the appellants annually for the past ten years, Nevertheless, the fact that one may be occupying segregated public land and diligently working toward making discovery cannot serve to give him any rights unauthorized by law.

The decisions appealed from are affirmed.

Messrs. Albert Gardini and John Baldrica are allowed the right of appeal herefrom to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D.C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers all four mining claims adversely affected by this decision, the total filing fee is $20. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed, the appellants will have the burden of proving, by presenting and substantial evidence, wherein the decision appealed from is in error.

Frances A. Patton
Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2
Dist. on page 4

DISTRIBUTION:

Albert Gardini (Certified Mail)
John Baldrica (Certified Mail)
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Div L&M PM (2)
OPD
Regional Forester, USDA
Forest Service, Div Watershed Mgmnt, USDA (12)
Hon. Harold T. (Bizz) Johnson, House of Representatives
Gower Federal Service
Appeals List No. 1
DEH

March 3, 1849

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

IN REPLY REFER TO:
704
S 1053
1054
1055
1056

INTERIOR
D MANAGEMENT
AND OFFICE
1968 MAR 4 AM 10 00

FEB 29 1968

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Kenneth J. Campeau
Attorney at Law
P. O. Box 231
Burlingame, California

Dear Mr. Campeau:

Presently before this office are appeals S 1053 - S 1056, inclusive, filed by you in behalf of A. L. Snyder and Clarence S. Black from a Sacramento land office decision dated January 10, 1968, which declared null and void ab initio their Feather River Lime Nos. 1, 2, 3, and 5 lode mining claims, located August 17, 1967, in the NE¼ section 2, T. 21 N., R. 6 E., M.D.M., Butte County, California, within the Plumas National Forest, for the reason that the lands were withdrawn from mining, at the time of location of the claims, pursuant to section 2 of the Act of August 11, 1955 (65 Stat. 681; 30 U.S.C. § 621 (1964)).

We have received the Department's decision A. L. Snyder et al., A-30880 (February 14, 1968), which affirms the Bureau and land office decisions holding as null and void ab initio the Feather River Lime Nos. 2, 3, 4, and 5 lode mining claims of Snyder and Black located September 2, 1961, in the NE¼ section 2, T. 21 N., R. 6 E., M.D.M., for the reason that the land was not open to mining entry on the date of original location, and which declares as null and void ab initio the Feather River Lime Nos. 1, 2, 3, and 5 lode mining claims relocated August 17, 1967, in the same NE¼ section 2, T. 21 N., R. 6 E., for the reason that the land was not open to mineral entry on the date of relocation because of an existing withdrawal for a Power Project under the Act of August 11, 1955, supra.

The Department's decision constitutes the Department's final administrative determination on this matter.

Although the land office acted correctly in its decision of January 10, 1968, the subject is now res judicata because the Department's decision, A. L. Snyder et al., supra, fully considered the relocated claims of August 17, 1967, at your request, and declared them to be null and void ab initio.

No further action will be taken on the appeals S 1053 - S 1056, inclusive, from the Sacramento land office decision of January 10, 1968.

Sincerely yours,

Frances A. Patton

Frances A. Patton
Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

cc: A. L. Snyder
Clarence Black
SD (California)
LO (Sacramento) ✓

appeal to Sec
affirmed A-30980

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 MAR 6 PM 3 13

Mining Claims: Discovery 3413

When the sole production of a placer mining claim is "blow sand" that can be used only in a small local market area as underfill, a discovery of a valuable mineral has not been made since sand so used cannot be classified as a mineral subject to location under the mining laws.

Where the record does not contain evidence of the probable costs of extracting, processing, and transporting magnetite for comparison with the price for which it could be sold, the required showing for a discovery (that a profit may reasonably be expected to result) has not been established.

A Government mineral examiner has no duty to explore beyond current workings in an effort to verify a purported discovery. He is not required to prospect the claim.

United States of America v. Robert A. Spooner et al., Riverside Contest No. 06370 (February 29, 1968)

In reply refer to:
704
Riverside Contest No.
06370

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

February 29, 1968

CERTIFIED MAIL
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DECISION

United States of America, Contestant, v. Robert A. Spooner, Margaret E. Spooner, Lawrence W. Stevens, W. B. Grossardt, Gordon A. Christiansen and Dorothy R. Christiansen, Contestees-Appellants.	:	Blue Sky Annex placer mining claim located in sec. 17, T. 27 S., R.40 E., M.D.M., California.

Decision Affirmed

Mr. Spooner has appealed on behalf of all of the above-named contestees, and Dr. Stevens and Mr. Grossardt have filed a separate appeal, from the Hearing Examiner's decision dated July 25, 1967, which held that the above-identified mining claim is null and void for lack of a valid discovery thereon.

The mining claim was located on April 26, 1949 (Exh. 1), by Mr. and Mrs. Spooner and Dr. Larry Stevens, together with certain other parties no longer asserting an interest in the claim (Exhs. 2, C). See the district and land office decision herein dated February 4, 1966. Mr. Spooner quitclaimed approximately 20 acres of the quarter section embraced within the claim to appellant Stevens (Exh. 3), and Mr. and Mrs. Spooner quitclaimed a similar amount of the claim to appellant Grossardt (Exh. 4). 1/ Mr. Spooner testified that the mining claim is chiefly valuable as a source of sand and gravel to be used in the nearby community of Ridgecrest (Tr. 84, 86). However, the locator is also of the opinion that there is a valuable deposit of magnetite under the northerly part of the claim (Tr. 64).

The amended complaint alleges, in pertinent part, that:

> Minerals have not been found within the limits of the claim in sufficient quantities to constitute a valid discovery.
>
> The material found within the limits of the claim is not now a valuable mineral deposit under section 3 of the act of July 23, 1955 (69 Stat. 367; 30 U.S.C. 601) and no market existed for the material prior to July 23, 1955.

1/ At page 2 of his decision, the Hearing Examiner erroneously identified the two conveyed portions of the mining claim as ten-acre portions.

A hearing was held before the Hearing Examiner on March 21, 1967.

A mining engineer employed by the Bureau testified that he had examined the mining claim, and found a number of small excavations on the land. The witness testified that the exposed material is alluvial material derived from the weathering of granitic rock, that such material is widespread over much of the Mojave Desert, and that it has no special use, property or value (Tr. 17). The mineral examiner took samples of sand from the principal workings on the claim (Tr. 10-12; Exh. 7) and had laboratory tests made. The reports of these sieve analyses show that 85 to 95% of the material tested will pass through a number 4 screen (Tr. 13; Exhs. 8, 8-1, 8-2). The mining engineer is of the opinion, based upon his observations and the laboratory test results, that the sand on the claim has a limited use, if any, for other than fill material (Tr. 13-14, 16). He stated that "blow sand" would not satisfy the general requirements of the market because of its lack of rock-sized material (Tr. 30). He saw material being removed from the claim for use as fill dirt (Tr. 27-28).

Mr. Spooner and a real estate dealer each testified that the decomposed granite on the claim compacts so that it is usable for road fill and fill dirt (Tr. 33, 78-79). Mr. Spooner has contracted to allow the real estate developer to remove such material from a portion of the claim at a price of 5¢ per cubic yard (Exh. K). Mr. Spooner once entered into an agreement with another party (Exh. L) for the removal of such material, but no material was removed under the agreement (Tr. 39). The locator testified that between 1963 and 1967 he sold road fill and fill dirt from the claim for 10¢ per cubic yard, he does not know how much material he thus allowed to be removed, and he states that the price he obtained is "about the lowest price you can get for any material" (Tr. 36, 65). The witness evidenced that the State Division of Highways had removed 3,000 cubic yards of decomposed granite from borrow pits on an adjacent claim at a price of 3½¢ per cubic yard (Exh. I), and he considers the material on the claim in issue as a reserve, if necessary, for such material (Tr. 60-61). Appellant Grossardt testified that he is in the ready-mix concrete business, that he has used fill material from the subject mining claim, and that he plans to mix "blow sand" from the portion of the claim that he was quitclaimed with oil and pea gravel he will obtain from elsewhere to formulate commercially-usable aggregate or road mix (Tr. 67, 71, 73, 75). The witness has not developed the proportions of each material required for such aggregate, nor has he tested such materials (Tr. 73), but he is of the opinion that he can make use of the "blow sand" on the claim (Tr. 74). Mr. Spooner hopes that the material on the claim can be used in a "hot plant mix," but no material from the claim has been so used (Tr. 61, 65).

The locator's speculation that the material may have uses other than as fill material is not sufficient to refute the testimony of the Government's expert witness that such material has limited, if any, use other than as fill material. Contestees have the burden, after the Government has established a prima facie case, of proving the issue of discovery by a preponderance of the evidence. Converse v. Udall, 262 F. Supp. 583, 596 (D. Ore. 1967).

The evidence establishes that the sand and gravel business requires a combination of rock with the sand to make the material commercially useful (Tr. 30). See United States v. Mary V. Chamberlin, A-28610 (July 17, 1961) for a discussion of such materials. Although other uses have been proposed, the testimony adduced at the hearing shows that the only proven use for the material on the claim is as fill. The Department has held that the fact that "blow sand" has been sold for use as fill does not satisfy the requirements of a discovery under the mining laws. United States v. Abe Jaramillo, A-28533 (February 6, 1961). The Associate Solicitor ruled in his opinion, M-36295 (August 1, 1955), that sand which can be used only for "filling" purposes is not subject to location under the mining laws. The Associate Solicitor concluded at page 6 of his opinion that:

> * * * This position appears to be sound for the very reason that unlimited areas of the public lands contain materials of one sort or another which might be used merely for moving from one place to another for leveling or filling purposes. However, this fact alone cannot be said to justify a ruling that such lands are "mineral in character" or "contain valuable mineral deposits" such as will support an entry and patent under the mining laws.

The Materials Act of July 31, 1947, as amended (30 U.S.C.§ 601 *et seq.* (1964)), provides, in pertinent part, for the sale of common varieties of sand based, with certain exceptions, upon an adequate compensation, where disposal of such material is not otherwise authorized by law. Clearly, Congress recognized by that act that sand, even though having some commercial use, is not locatable under all circumstances. The Hearing Examiner properly held that the fill material exposed on the mining claim in issue is not locatable material as such.

Concerning the magnetite, 2/ Mr. Spooner testified that most of the north half of the mining claim may contain magnetite-bearing material at a depth of 20 feet, based upon his panning of material and testing it with a magnet (Tr. 64). No magnetite has been found on the portions of the claim from which fill material has been removed (Tr. 64-65). The Bureau mineral examiner took channel samples of the iron-bearing area of the claim, and the four samples varied in magnetite content from 2.4% to 4%. Although an assay report (Exh. A) offered by Mr. Spooner showed an iron content of 11.5%, the locator agreed that the mineral examiner's "bank run" material would test lower than the screened material he had assayed (Tr. 52-53). He stated that his material assayed as "bank run" material may test about 5% (Tr. 53). The Bureau's mining engineer is of the opinion, based upon his sampling, that approximately 4% of the material in place on the iron-bearing portions of the claim may be magnetite (Tr. 83-84). The witness is of the opinion that the quantity of magnetite contained within the material is insufficient to support successful mining operations (Tr. 15-16).

2/ Magnetite is rock containing 72.4% iron (Tr. 15). United States Bureau of Mines Bulletin No. 95 (1947 Reprint), page 414.

Mr. Spooner testified that he has no knowledge as to the percentage of magnetite in place on the portions of claim where iron has been found (Tr. 85); that no attempt has been made to determine the costs of separating the material (Tr. 56-58). Furthermore, no magnetite concentrate has been produced from the claim for other than test purposes (Tr. 63). Mr. Spooner agreed that any profit from such operation could only be after several years of operating (Tr. 57), and that the plant may earn less than fifty cents per ton (Tr. 59). Without knowing the cost of the screening plant (Tr. 57-59) or knowledge as to the percent of iron in the material (Tr. 59-60, 85), the locator assumes that a magnetite operation on the claim is commercially feasible (Tr. 53).

To qualify as a "valuable" mineral deposit under 30 U.S.C.§ 22 (1964), a deposit must be of such character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. Castle v. Womble, 19 L.D. 455, 457 (1894). Applying this rule, the Department recently denied an application for patent based upon an alleged discovery of iron and titanium, observing that the record must contain evidence of the probable costs of extracting, processing, and transporting the mineral product for comparison with the price for which it could be sold, and that such evidence must show, when taken with all other evidence, that a profit will probably result in the reasonably near future. See United States v. New Jersey Zinc Co., 74 I.D. 191, 196 (1967). 3/

The Hearing Examiner properly held that the testimony of Mr. Spooner, unsupported by any probative evidence as to the cost of recovering the magnetite is insufficient to establish the feasibility of the recovery of the magnetite. A prudent man would not expend his labor and means to develop a valuable mine on the property without further information to show that he could reasonably expect a profit. Consequently, the evidence of the contestees, not buttressed by information as to costs, failed to preponderate as against the showing of the contestant that the quantity of magnetite contained within the material in place is insufficient to support successful mining operations.

The appellants complain that the mineral examiner made only "a cursory examination" of the claim--pointing out that the examiner testified (Tr. 26) that "If I were to examine it on my own I would do much more excavation and sampling." The appellants err is assuming that the Government has an affirmative duty to search for indications of discovery of valuable deposits of mineral on a mining claim; the mineral examiner has no duty to explore beyond the current workings of the mining claimant. The function of the Government is one of investigating for the purpose of verifying, if possible, the claimed discovery. See United States v. Thomas C. Wells, A-30805 (January 8, 1968), and the several cases cited therein. The Bureau mineral examiner is not required to do the exploring on the claim that the mining claimants must do to establish an asserted discovery. The record establishes that the Bureau examiner is trained and qualified (Exh. 5), his evidence did establish a prima facie case that there is no discovery on the claim, and

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3/ Now pending review, see New Jersey Zinc Co. v. Udall, 67-C-404, United States District Court for Colorado.

the appellants must bear the consequences of failing to offer evidence to rebut his evidence.

The appellants assert that the Hearing Examiner's decision is based upon hearsay evidence. Upon a review of the testimony and exhibits in the record, we find that the evidence is sufficient to sustain the conclusion of the Hearing Examiner that no valid discovery has been made on the claim. The rule has been long settled that the technical rules for the exclusion of evidence are not applicable to administrative proceedings, and hearsay evidence may be admitted in such a proceeding. The mere receipt of hearsay evidence is no cause for a reversal of an administrative decision. See United States v. Richard C. Porter et al., A-29882 (April 24, 1964). The assay reports were merely corroborative of the testimony by the Government mineral examiner, and the Hearing Examiner's decision was clearly based upon the testimony of the witnesses at the hearing.

Mr. Spooner argues that insufficient weight was given to a letter (Exh. J) from a mining engineer named Morris J. Gudal. Since Mr. Gudal was not present at the hearing where he could be cross-examined, his opinion would not have the weight of the Government witness who was at the hearing. However, Mr. Gudal's letter did not offer an opinion as to the quality or quantity of the magnetite deposits in issue as alleged in Mr. Spooner's appeal.

The Hearing Examiner's decision is affirmed.

The above named appellants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed, the appellants will have the burden of showing wherein the decision appealed from is in error.

If an appeal is taken by the appellants, the adverse party who must be served is:

Regional Solicitor
U.S. Department of the Interior
7759 Federal Building
300 North Los Angeles Street
Los Angeles, California 90012.

Frances A. Patton
Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

Dist. on page 6

DISTRIBUTION:

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Regional Solicitor, U.S. Department of the Interior (Los Angeles)
Mrs. Margaret E. Spooner
Dr. Lawrence W. Stevens
Mr. W. B. Grossardt
Mr. Gordon A. Christiansen
Mrs. Dorothy R. Christiansen
Hearing Examiner Rudolph M. Steiner (Sacramento)
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Gower Federal Service
Appeals List No. 1
JHO'D

DOCKET FILE

Mining Claims: Discovery 3413

To constitute a valid discovery upon a lode mining claim there must be a discovery on the claim of a lode or vein bearing mineral which would warrant a prudent man in the expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine; it is not sufficient that there is only a showing that would warrant further exploration in the hope of finding a valuable deposit.

Labor costs are properly a factor to be considered in determining whether a discovery has been made pursuant to the prudent man rule.

Mining Claims: Determination of Validity 3400.1

The assay value in narrow stringers adjusted to a minable width is a factor to be considered in determining the validity of a lode mining claim.

United States v. *Tommy Craig et al.*, Contest No. 078780 (Sacramento) (March 2, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 MAR 20 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In Reply Refer to:
704
Contest No. 078780
(Sacramento)

March 2, 1967

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DECISION

United States	:	Lady Alyce No. 1 quartz mining claim situated within the $NW\frac{1}{4}$ Sec. 33, T. 1 S., R. 19 E., M.D.M., Tuolumne County, California
v.	:	
Tommy Craig and Nell Craig	:	

Decision Affirmed

Tommy and Nell Craig have appealed from a Hearing Examiner's decision, dated April 16, 1965, which declared the Lady Alyce No. 1 quartz mining claim null and void for lack of discovery of a valuable mineral deposit within the limits of the mining claim.

The contest complaint initiating adverse proceedings against the mining claim charged (1) that the land embraced within the claim is nonmineral in character, and (2) that the existence of a deposit of valuable minerals of sufficient quantity to constitute a valid discovery is not disclosed within the boundaries of the mining claim. A hearing was held on January 19, 1965, at which all parties were represented by counsel.

The mining claim was located on September 24, 1956. The minerals referred to are gold and silver. The country rock is granodiorite of the Sierra Nevada. It was stipulated that there has been no actual production from the mining claim involved (Tr. 9).

Mr. George Scarfe, Valuation Engineer, Mining, employed by the Bureau of Land Management, testified on behalf of the contestant in regard to his examination of the claim. He described the general geology of the area and the country rock. On his first visit to the claim in June 1964 he was able to plot the approximate position of the Lady Alice. He found some old trenches and a few drifts which he examined and sampled. He was on the claim four separate days. He prepared a sketch map of the Lady Alyce No. 1 showing the location of the claim and the relocated highway over and through the claim. Sample S-119 is a grab sample from a dump by a trench and caved drift close to the left side line of the claim. He could not get into the drift but he could examine the trench. He found no mineralization but there was some quartz which he believed had come from a stringer that was not over two or three inches wide (Tr. 25). This sample had an assay value for gold of $1.23 per ton and 37 cents per ton in silver (Exh. 8A).

Samples S-121 and S-122 were taken from a trench 39 feet long running in a northerly direction as shown on Exh. 6. It was an old trench, dug at right angles to what would be considered the strike or bearing of any veins or stringers. Below the trench was an old, caved drift and from the size of the dump it did not appear to have gone in more than 15 feet. The full length of the trench was channeled by him, from which the two samples were taken (Tr. 31). The assay for sample S-121 shows gold none and silver none. The assay report for sample S-122 shows gold none and a silver assay ton value of 19 cents (Exh. 8A). Sample S-120 was taken along the length of a 6 foot trench at right angles to the trench from which samples S-121 and S-122 were removed (Tr. 32). S-120 had an assay value in gold of 18 cents per ton and in silver 18 cents per ton (Exh. 8A).

Samples S-119, S-120, S-121 and S-122 at the time Mr. Scarfe took them were outside of the area that was disturbed by highway construction (Tr. 33). His next visit to the claim was in July 1964. He examined a bulldozer cut in the northern part of the claim and found silicification near the southwest end of the cut. A large sample across the cut and down the side was labeled S-126. Another sample of the silicification, 12 inches wide, was marked S-127 (Tr. 33-34). S-126 had an assay ton value for gold of 35 cents and 9 cents for silver. The assay value of S-126 for gold was $2.45 per ton and for silver 19 cents per ton. (Exh. 8A). This cut is north of the highway but within the limits of the mining claim (Tr. 23).

In November 1964 Mr. Scarfe took samples S-151 and S-152. S-151 was taken on a 4 inch quartz stringer exposed in a road cut. S-152 was taken immediately south of the stringer in decomposed granite, the country rock, which was a little more oxidized, reddish in color, than the rest of the material (Tr. 34, Exh. 7D). The 4 inches he sampled was the widest spot. The stringer tapered to three inches at the bottom of the cut, and as the stringer went up the cut it gradually narrowed and turned to the south and disappeared. It could not be traced to the surface. He supposed it was uncovered by the road cut as it was 20 to 30 feet below the original surface. (Tr. 37). The assay ton value of S-151 for gold was $142.97 and 0.935 ounces for silver. The sample was reassayed as S-501. It had an assay ton value for gold of $121.36 and 1.605 ounces for silver (Exhs. 8B and 8C). The assay ton values for S-152 for gold was 35 cents and nil for silver (Exh. 8D).

Samples S-153 through S-157 were taken in a bulldozer cut of fresh decomposed granite west of the constructed area of the highway. S-158 was taken in the same cut from a piece of quartz float found on the west bank of the cut, about 4 feet below the surface (Tr. 34-36). The assay ton values for gold for samples S-154 through S-157 are shown as nil and for S-153 and S-158 are shown as $1.05 and $3.50, respectively. The assay ton value for silver in these six samples ranged from nil to 0.205 ounces (Exh. 8D).

Mr. Scarfe testified concerning a 2 inch stringer, plotted on Exhibit 6 in red ink close to Road Station 1032, which is exposed on the west bank of the cut and a little on the east bank. He was able to "pick" across the unsurfaced highway. He found little pieces of quartz which to him showed that the stringer extends across the highway (Tr. 36-37). Sample S-156 was taken from the west bank (Tr. 44).

The mineral examiner for the contestant stated that his testimony pertained to two structures. One structure was the stringer from which he removed sample S-151 where it was 4 inches wide. The other structure was the silicification from which he obtained sample S-127 (Tr. 43). All the others were soil samples taken along the length of the cuts.

Mr. Scarfe related that, except for the samples from the small silicified area and the grab samples of quartz, he split the samples in half prior to submission for fire assays. The half he retained, he panned looking for gold (Tr. 45-46). He added that there are two types of material on the claim, decomposed granite and the small stringers. The mining of decomposed granite would require a massive open pit operation which he dismissed because the material did not carry significant values of mineralization (Tr. 52-54). The stringers, if mined, would be by the underground method requiring a minimum mining width of 3½ feet (Tr. 54).

It was Mr. Scarfe's opinion, based upon his examination of the subject claim, that the lands within the limits of the claim are not valuable for their mineral content (Tr. 64), and that a discovery of mineral of such quality and in such quantity as would justify a person of ordinary prudence in expending further time and money with a reasonable prospect of success in developing a valuable mine, has not been made (Tr. 68-70). The foundation for his opinion was the quantity of mineralization in the granodiorite and the few narrow quartz stringers; while they carry values, they did not have enough width or quantity that would have sufficient values when mined at a minable width to make it economical (Tr. 64). He testified that the 4 inch wide stringer could not be mined at a profit as it would require a minable width of 3½ feet or 42 inches in order to remove it. In this regard he stated that the values as indicated by the assay of sample S-151, or its reassay under S-501, would be computed downward or reduced to $12.80 a ton (Tr. 93). It was his estimate that at present the absolute minimum cost of mining is $20 a ton (Tr. 94).

Mr. Robert T. Orr, Highway Engineer for the Bureau of Public Roads with the State Division of Highways, was a witness for the contestant. He testified that in June 1962, while checking the highway right-of-way drainage prior to going into contract, he traversed the project in the area of the Lady Alyce No. 1 and came upon an excavation across the center line of the proposed roadway at approximately Station 1032. The cut extended downhill about 110 feet and probably 15 feet uphill. He estimated the cut to be 10 feet deep on the high side and 6 feet on the low side. It came to a "V" at the bottom, indicating to him that it was either some years old or had been dug by a method other than a bulldozer. Upon inquiry in the vicinity, he was advised that the cut was made to open up the mining property. Mr. Orr stated he observed no other cut or depression within the mining claim along the center line of the proposed highway (Tr. 97-100). He also testified that the cut was some distance above their roadway grade so that when construction began it was removed and only 20 to 30 feet of the cut is left at the lower end (Tr. 108).

Mr. Tommy Craig, a contestee, testified that he and his wife owned the Lady Alyce No. 1 claim, having purchased it in 1961 from a Mr. Beckes. He related that prior to the roadway construction he was working on the claim at the places marked "X" and "Y" on Exhibit 6. Point "X" is a bulldozed cut from which considerable rock, quartz and dirt had been removed to expose the vein. The cut was near the highway center line. It was about 250 feet long and probably 30 to 35 feet at the deepest point. Mr. Craig stated that in 1961 they had two assays run from this opening. The report for these shows assay ton values in gold of $2.27 and $4.55 (Tr. 111-113, Exh. A). He revealed that point "Y" except for bulldozing the brush and removing the top was worked by pick and shovel and they did not get in too far. An outcrop was picked up at point Y. The assay ton value of the sample taken at this point was $3.50 in gold. This witness testified that points "X" and "Y" were covered up during the highway construction and he had been instructed not to do any work within the boundaries of the highway, but if he did, that he would have to go down 100 feet below the surface of the highway and then come underneath it. (Tr. 112-114, 123-123, Exhs. A and B). Mr. Craig estimated that it would take four or five years to do this. Since then mostly on weekends, with pick and shovel, Mr. Craig stated he has been attempting to re-find the stringer (Tr. 115-116, 121). Mr. Craig disclosed on cross-examination that the samples from the two stringers he sent for assay were taken at random and weighed about 10 pounds each (Tr. 125, 131).

The appellants assert that the contestant failed to carry its burden of proof in that it did not investigate conditions below the surface of the claim, that the purpose of these proceedings is to reduce the cost of the purchase of the claim in condemnation proceedings, that the highway construction on the claim has prevented the contestees from locating valuable ore bodies that may well exist under the surface of the claim, and that the contestees are being deprived of their property without due process of law, without fair and reasonable compensation, and the equal protection of the laws. The appellants also urge that since Mr. Craig, one of the contestees, is retired he can work the claim more cheaply and that the Government should be declared estopped from these or any proceedings to declare the claim null and void for a period of sereral years in order to afford the contestees an opportunity to restore the claim to the point reached prior to location of the highway thereon.

Under the mining laws one may take possession of vacant public land open to mining location under those laws and, after filing notice of location, retain that possession against all except the Government while he is in diligent prosecution of efforts to discover valuable mineral therein, but when the Government withdraws its consent to such location, either by withdrawing the land from the operation of the mining laws or by the institution of adverse proceedings against a mining claim, the mineral claimant must show that he has made a discovery of valuable mineral deposits within the limits of his claim in order to retain his possession. United States v. Everett Foster et al., 65 I.D. 1 (1958). An unpatented mining claim is valid against the United States if there has been a discovery within the limits of the claim, if the land is still valuable for its mineral, and if other statutory requirements have been met, but so long as the legal title remains in the United States, the Government has power, after proper notice and a hearing, to determine whether the claim is valid and, if found invalid, to declare it null and void. Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); Cameron v. United States, 252 U.S. 450 (1920).

The Supreme Court of the United States has long recognized that the Department of the Interior, as a special tribunal, had been granted plenary authority over the administration of public lands, including mineral lands. Its most recent expression is contained in Best v. Humboldt Placer Mining Co., supra, which was concerned with a situation wherein the United States had sued in a District Court to condemn certain property which included the respondents' mining claims, inferred to have been inundated by a reservoir, and thereafter the United States instituted a contest proceeding seeking an administrative determination of the validity of the mining claims alleging, as here, that the land embraced within the claims is nonmineral in character and that minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery. The decision of the Supreme Court stated, in pertinent part:

> Congress has entrusted the Department of the Interior with the management of the public domain and prescribed the process by which claims against the public domain may be perfected. . . .
>
> The United States is not foreclosed from insisting on resort to the administrative proceedings for a determination of the validity of those claims. . . .
>
> The institution of suit is one way to obtain immediate possession; and we see nothing incompatible between the use of that means to obtain possession and the use of the administrative proceeding to determine title. . . .

> We conclude that the institution of the suit in the District Court was an appropriate way of obtaining immediate possession, that it was not inconsistent with the administrative remedy for litigating the issue of title, and that the District Court acted properly in holding its hand until the issue of the validity of the claims has been resolved by the agency entrusted by Congress with the task.

Similarly, therefore, the United States is not estopped from continuing these proceedings to determine the validity of the Lady Alyce No. 1 quartz claim. These proceedings do not violate due process nor any of the constitutional provisions alleged in the reasons for appeal. The entire proceedings have been conducted in compliance with the provisions of the Administrative Procedure Act, 5 U.S.C. § 1001 et seq. (1964). The appellants have had notice of contest by service of a contest complaint setting forth the allegations against their mining claim. A hearing was held for the purpose of receiving evidence by both parties to the proceeding to determine the truth of the charges.

When the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case. The burden then shifts to the mining claimant to show by a preponderance of evidence that his claim is valid. Foster v. Seaton, 271 F. 2d 836 (1959); United States v. Clyde R. Altman and Charles M. Russell, 68 I.D. 235 (1961). The mining claimant must show that he has made a discovery of a valuable mineral deposit within the limits of his claim. United States v. George C. Johnson et al., A-30606 (October 25, 1966).

We find the testimony of the Government's mineral examiner adequate to establish a prima facie showing that there was no discovery on the claim. He examined and sampled all the likely places on the claim as best he could without the cooperation of the claimants, and he had no duty to attempt to make a discovery for the mining claimants. United States v. Ford M. Converse, A-30177 (March 26, 1965).

The mining laws of the United States provide that all valuable mineral deposits in the public lands of the United States shall be open to exploration and purchase and that the lands in which they are found shall be open to occupation and purchase except as other provision may have been made for their disposal. 30 U.S.C. § 22 (1964). Discovery is necessary to give the claim validity. 30 U.S.C. § 23 (1964). Although the mining statutes do not specifically define a "discovery," it has been held that one exists where:

> . . . minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, . . . Castle v. Womble, 19 L.D. 455, 457 (1894); Best v. Humboldt Placer Mining Co., supra.

In the case of a lode claim, as was stated in the Hearing Examiner's decision, the elements necessary to establish a valid discovery are (1) there must be a vein or lode of quartz or other rock in place, (2) the quartz or other rock in place must carry gold or some other valuable mineral deposit, and (3) the two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in an effort to develop a valuable mine. Jefferson-Montana Copper Mines Co., 41 L.D. 320 (1912); United States v. C. F. Smith, 66 I.D. 169 (1959).

It is proper to consider the cost of extracting the mineral, not to ascertain whether assured profits are presently demonstrated, but whether under the circumstances a person of ordinary prudence would expend substantial sums in the expectation that a profitable mine might be developed. Adams v. United States, 318 F. 2d 861 (1963).

At the hearing the appellants' offered no evidence to counter the mineral examiner's testimony to the effect that the present day cost of mining underground is at least $20 a ton, which would include the removal of worthless material (Tr. 94). The assertion that since Mr. Craig is retired he could work the claim more cheaply is an implied admission that the mineral examiner's estimate of mining costs was essentially correct.

Labor costs must be considered in determining whether a mining operation has a reasonable prospect of success. There is no reason to treat the value of the labor of a mining claimant any differently from that of one he might hire; either one must be taken into consideration in determining the likelihood of a profitable venture being established. United States v. Vernon O. and Ina C. White, A-30460 (December 3, 1965). There is nothing in the record to show that the claim could be worked for less by Mr. Craig's own labor. The record established at the hearing is the sole basis for a decision, except to the extent where official notice may be taken. See 43 CFR 1850.0-8; United States v. Orion L. Fenton, A-30621 (January 9, 1967).

While the appellants do not actually assert that a discovery has been made within the limits of the claim, they point to the assay reports and maintain that the claim is not worthless. Mineral has been shown to exist on the claim; accordingly, the primary question is whether a valid discovery has been made. Assays of samples have only limited value as evidence. United States v. Northern Pacific Railway Co., 1 F. 2d 53, 57 (1954). One high value assay alone will not validate a mining claim. Mineral samples containing high values do not conclusively establish the existence of a discovery. As assay reports must be interpreted in the light of the manner in which the samples were taken, the extent of the minerals sampled, and other pertinent facts, they are neither the absolute test nor the sole basis for determining whether a claim is valid or invalid. United States v. Edwin R. Saurers et al., A-30097 (July 9, 1964).

The appellants refer to being hindered in locating ore bodies that "may well exist under the surface" of the claim. The inference from their statement is that the most that can be said for the claim is it warrants further exploration. The recognition of mineralization as sufficient to deserve further exploration does not establish the existence of a discovery. There is a difference between the evidence which will induce a person of ordinary prudence to spend his time and money in an effort to develop a valuable mine and the evidence which will induce him to spend time and money for further exploration of his claim. This distinction was discussed by the Hearing Examiner, citing United States v. Clyde R. Altman et al., supra.

In the instant case, considering the narrow width of the stringers and the values they carry, adjusted to a minable width in relation to mining operating costs, it is clear that the claim does not presently meet the prudent man standard for discovery of valuable mineral. We conclude that the appellants have failed to overcome the prima facie case of the contestant by a preponderance of evidence.

Accordingly, the Hearing Examiner's decision declaring the Lady Alyce No. 1 quartz mining claim null and void is affirmed.

Mr. and Mrs. Craig are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

In the event an appeal is taken the adverse party to be served is:

Regional Solicitor
United States Department of the Interior
P. O. Box 21-4527
Sacramento, California 95821

Frances A. Patton

Acting Chief, Office of Appeals and Hearings

Enclosures

DISTRIBUTION:

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OPD
Gower Federal Service
Appeals List No. 1
WHW

appeal to Sec
affirmed A 30805 - 1-8-68
List 2-9-68
Remanded Supp 4-25-69

DOCKET FILES

Mining Claims: Discovery 3413

It is proper to declare a placer mining claim null and void where the evidence presented in a contest proceeding fails to show the existence of a discovery of a valuable mineral deposit, the evidence showing only that there is some mineral not sufficient in amount to justify a prudent man to expend further time and money with a reasonable prospect of success in developing a valuable mine.

Thomas C. Wells, Contest No. 078516 (Sacramento) (March 10, 1967)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In Reply Refer to:
704
Contest No. 078516
(Sacramento)

March 10, 1967

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America, Contestant	:	Betty Boop No. 1 placer mining claim, situated in section 34, T. 39 N., R. 7 W., M.D.M., Trinity County, California, within Shasta-Trinity National Forest
v.	:	
Thomas C. Wells, Contestee	:	

Decision Affirmed

Mr. Thomas C. Wells has appealed from a decision of a Hearing Examiner dated November 1, 1965, which declared his Betty Boop No. 1 placer mining claim null and void for lack of a discovery of a valuable mineral deposit within the boundaries of the claim.

The contest proceeding was initiated on behalf of the United States at the request of the Regional Forester (San Francisco, California), Forest Service, United States Department of Agriculture, by the filing of a complaint alleging (a) the land embraced within the claim is not mineral in character, (b) the existence of a deposit of valuable minerals of sufficient quantity to constitute a valid discovery is not disclosed within the boundaries of the mining claim, and (c) a residential dwelling has been constructed on the claim and the claim is being used for purposes other than active prospecting, mining or processing operations and uses reasonably incident thereto. The contestee filed timely an answer denying the allegations, and a hearing was held May 14, 1965 at Sacramento, California. At the hearing the contestant was represented by the Office of General Counsel, United States Department of Agriculture, San Francisco, California, while the contestee appeared personally and was represented by counsel.

The case record discloses that the Betty Boop No. 1 placer mining claim was located June 20, 1955 on the NE¼NE¼SE¼, SE¼SE¼NE¼ section 34, T. 39 N., R. 7 W., M.D.M. The claim is on the Trinity River approximately 9 miles north from the confluence of Coffee Creek, within the Shasta-Trinity National Forest. The claim was located for gold-bearing placer gravel.

The Hearing Examiner, after hearing testimony and receiving evidence, sustained the charge of no discovery set forth in the complaint, and held the Betty Boop No. 1 placer mining claim null and void for the reason that discovery of valuable mineral deposits had not been made within the boundary of the claim. The Hearing Examiner then determined that this holding eliminated need for a ruling on the charge relating to the mineral character of the land, and he finally dismissed the charge that residential use was being made of the claim.

In his appeal Mr. Wells does not express disagreement with the legal principles enunciated by the Hearing Examiner in the decision, but, in essence, he differs from the factual findings of the Examiner and his conclusions therefrom that discovery within the meaning of the mining law has not been made. The appellant contends that undue weight was given to the uncorroborated testimony of the Government's witness, who made only a cursory mineral examination of the mining claim, and that it was error to attribute an interest in the mining claim to Mr. Graff and so impeach his favorable testimony relative to discovery of valuable minerals worthy of development by a prudent miner. He contends the bias on the part of the Government's mineral examiner compelled the cursory examination to sustain his preconceived notion that the Betty Boop No. 1 placer mining claim had no valuable mineral discovery. He avers that the mineral examination was made without prior notice to the claimant, who thus had no opportunity to reopen the discovery pit, which had been backfilled legitimately, or to be present when mineral sampling was done. He contends that the Forest Service initiated this proceeding to eliminate the Betty Boop No. 1 placer mining claim as if it were solely used as a site for a summer cabin, and so acquire a good site for development.

We have reviewed the entire case record and, holding the contentions of the appellant in mind, summarize the pertinent facts adduced at the hearing. They are briefly, but adequately, set forth in the Hearing Examiner's decision.

The contestant's case was presented through the expert testimony of Minter E. Harris, a mining engineer employed by the United States Forest Service. Mr. Harris testified that he had examined the subject mining claim in 1962, accompanied by W. L. Johnson, a mining engineer of the United States Forest Service, at which time the claimant and Mr. Graff, the original locator, were also present. At that time some samples were taken from a dozer cut and from the river bed, and panned for gold. Other samples were taken by Harris alone in 1964. Mr. Harris estimated the value of the material he sampled at between 3 and 4 cents per cubic yard. Mr. Harris stated that, considering his sampling and based on his observations of the mining claim and his general experience, it was his opinion that a prudent man would not be justified in expending time and money in the expectation of developing a paying mine. Mr. Harris stated the only improvement on the claim was a dozer cut approximately 50 feet long, 12 feet wide and 5 feet deep, and that there was no mining machinery or mining equipment on the claim, but there were two cabins and a storage shed. He stated that the Trinity River north of Coffee Creek is noted for the occurrence of small bits of metal in the gravel, but the minor amounts of gold have never supported a successful paying operation above the confluence of Coffee Creek with the main stem of the Trinity River. The gravels in this area are made up of wash carried down from granitics found to the north and northwest.

On cross-examination, Mr. Harris stated that he did not believe any economic gold mining operation could be conducted in Trinity County /California/, but that he did not sample the Betty Boop No. 1 placer mining claim with any preconceived notion that it was a non-profitable venture. He asserted that his sampling was adequate in the circumstances, considering his general knowledge and experience in the Trinity River area.

The contestee's case was presented through testimony of the contestee, Thomas C. Wells, and of Leroy Dale Graff. Mr. Wells testified that the Betty Boop No. 1 placer mining claim was located in June 1955 by his step-father, Mr. Graff, because he was only a minor at that time, but that title to the mining claim had been assigned to him November 29, 1957.

At the time of location, Mr. Wells stated that he dug a discovery pit within the area of the present dozer cut, and panned values similar to those reported by Mr. Harris, the contestant's witness. Values found at the bottom of the discovery hole were sufficient, in his opinion, to warrant further exploration of the claim, and a prudent man would be justified in further expenditure of labor and money with reasonable prospect of success in developing a paying mine. Mr. Wells stated that, although no gold has ever been mined from the claim and sold, he thought that two or three individuals could operate the claim at a profit in the present day market, which is not favorable to gold miners. On cross-examination, Mr. Wells testified that his prospecting of the claim was completed as he knew where he would dig when he got around to it. He stated that 1,355 cubic yards of gravel had been moved since location of the claim, with the material being mostly overburden which had to be stripped to get down to values. After sampling was completed in the large pit, it was back-filled as a safety measure. The County has used some of the gravel for road maintenance, but no other material has been taken from the claim. No values have been found on the claim except in the pit, as it was initially excavated, Mr. Wells testified.

Mr. Graff, step-father of the contestee and original locator of the mining claim, qualified himself as a geologist and geophysicist. He testified that he had located the Betty Boop No. 1 placer mining claim after months of study of the Trinity River basin, and utilizing his geological experience, determined the subject site as the most favorable for a concentration of economic mineral values. Further exploration was necessary to determine how favorable the concentration really was, so he made a magnetometer survey over the mining claim. Based on the results of this magnetometer survey, Mr. Graff ascertained that the present dozer pit was the best spot to dig the prospect pit. Samples taken from the original prospect pit increased in value as the depth increased, with small flakes of free gold appearing at a depth of 8 feet. Mr. Graff then had core holes drilled around the prospect pit, the samples from the cores further indicating the presence of mineral values. From these showings, it was decided to explore further, so the dozer excavation was made by a D-6 Cat, with some 1,160 cubic yards of material being removed. Mr. Graff stated that he took samples at each foot level of the excavation, then had the hole back-filled. He alleged that the core samples assayed to values of 75 cents a cubic yard to a depth of 6 feet; $2.65 a cubic yard between 6 and 8 feet deep; and $5.25 a cubic yard between 8 and 10 feet deep. He stated the excavation samples were similar in value to a depth of six feet, but from 6 to 8 feet deep, the value rose to $4.10 a cubic yard, and from 8 to 10 feet deep, the value was $8.10 a cubic yard. Mr. Graff stated that he did not know how far bed rock was below the bottom of the excavated pit, but suggested that the values should increase even more as bed rock was approached. Mr. Graff stated his opinion that an operation efficiently processing 15 cubic yards of material yielding an average of $5.25 a cubic yard should yield a profit of $44.00 a day. He expressed his opinion that a person of ordinary prudence would be justified in further expenditure of labor and means with a reasonable prospect of developing a valuable mine at this location, if given knowledge and guidance of professional assistance. Mr. Graff averred that the sampling by Mr. Harris was inadequate because the mineral values are not associated throughout the area and much work would be required to delimit the actual area where values are present. The mineral values will appear as small kidneys. The surface of the river bar would not be considered by any competent engineer or geologist to yield commercial values. Mr. Graff testified that all mining activity on this claim took place in the area immediately surrounding the discovery pit, and that the north half of the claim is the principal area containing economic values, with the south half and part of the north being glacial till, moraine and transport, all highly unsusceptible of containing any concentration of gold or platinum.

The establishment of a valid placer mining claim is contingent upon the discovery of "valuable mineral deposits" in a form other than a vein or lode (30 U.S.C. § 22 and 35 (1964)). Under the mining laws one may take possession of vacant public land open to location under those laws and, after filing notice of location, retain possession against all, except the Government, while he is in diligent prosecution of his efforts to discover valuable minerals therein, but, when the Government withdraws its consent to such location, either by withdrawing the land from the operation of the mining laws or by institution of adverse proceedings against a mining claim, the locator must show that he has made a discovery of valuable mineral deposits within the limits of the claim in order to retain his possession. United States v. Everett Foster, et al., 65 I.D. 1 (1958).

The Department has consistently adhered to the definition of discovery laid down in the "prudent man" test, Castle v. Womble, 19 L.D. 455, 457 (1894), approved in Chrisman v. Miller, 197 U.S. 313 (1905), and reaffirmed by the Supreme Court in Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963), which is:

> "where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of * * * /a discovery/ have been met." 19 L.D. at 457.

A valid discovery under the mining laws requires more than a finding of mineral indications that would not warrant development work but only further exploratory work to determine if a valuable mineral deposit exists on the claim. United States v. Frank J. Miller, 59 I.D. 446 (1947); United States v. John L. Cooper et al., A-30267 (May 11, 1965). The Department has clearly distinguished exploration and development as they relate to discovery under the mining laws. Exploration work is that which is done prior to discovery in an effort to determine whether the land contains valuable minerals. Where minerals are found, it is often necessary to do further exploratory work to determine whether those minerals have value, and where the minerals are of low value, there must be more exploration work to determine whether those low-value minerals exist in such quantities that there is reasonable prospect of success in developing a paying mine. It is only when the exploratory work shows this that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made. United States v. Clyde R. Altman and Charles M. Russell, supra; United States v. Edgecumbe Exploration Co., Inc., A-29908 (May 25, 1964); United States v. Henault Mining Company, 73 I.D. 184 (June 15, 1966).

Further, where a mining claim is located in a national forest (as the claim in this proceeding is), the mining claimant is required to show the mineral values claimed by clear and unequivocal evidence. United States v. Harold Dale, A-30465 (January 20, 1966).

When the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case. The burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid. Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959); United States v. Swante C. A. Pirkola, A-30559 (June 29, 1966).

Upon review of the testimony in the record the evidence clearly establishes that although the contestee has found gold on the subject mining claim, he has not found a valuable deposit of gold that would justify development work within the meaning of the mining laws. He is still only in the stage of exploration. The appellant's expert witness stated a paying operation could be maintained by a minimum daily processing of 15 yeards of material yielding essentially $5.25 per yard, but the values for available mineral materials given in his testimony fall far short of that minimum figure, averaging less than $3 per yard to a depth of 10 feet, the extent of the alleged sampling. The Government's witness found the value to be more nearly 4¢ per yard in his sampling to a depth of 6 feet. Neither estimate is supported by factual evidence, however, and the principal probative value of the estimates of the witnesses is that they indicate a lack of proven mineral values in this claim.

The record supports the Hearing Examiner's findings, in substance, that "heavy minerals" exist on only limited areas of the claim, that no probative evidence was presented to show that the limited areas contain gold values in such quantity as would warrant further effort and expenditure with a reasonable expectation of developing a paying mine on the claim, that the Government established a prima facie case that there has not been a discovery of valuable minerals within the meaning of the mining laws, and that the appellant has not shown by a preponderance of the evidence that discovery has been made on the claim of a valuable mineral deposit.

The Hearing Examiner properly declared the Betty Boop No. 1 placer mining claim null and void for the reason of no discovery of a valuable mineral deposit within the limits of the claim.

The decision appealed from is affirmed.

Mr. Thomas C. Wells is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error. If an appeal is taken, the adverse party to be served is:

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Frances A. Patton

Acting Chief, Office of Appeals and Hearings

Enclosures 2

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Div. of L&M S&T (4)
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OPD
Hearing Examiner John A. Wood
Administrative Assistant, Appeals and Hearings
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Appeals List No. 1
DEH

DOCKET FILES

Mining Claims: Discovery 3413

Mining claims located for uranium are properly declared invalid when only low values are present on the claims, and there is no market for such low grade material.

United States of America v. John E. Laurance et al., Riverside Contest No. 05474-A (March 30, 1967)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 MAY 12 PM 2 22
③

In reply refer to:
704
Riverside Contest
No. 05474-A 1/

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

March 30, 1967

CERTIFIED MAIL
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DECISION

United States of America, Contestant, v. John E. Laurance, Robert A. Scott, Duane R. Sargent, John H. Quilliman, and David E. Griffith, Contestees-Appellants and Winifred A. Laurance, Appellant. 2/	:	Star Numbers 1 and 4 lode mining claims located in sec. 18, T. 7 S., R. 4 E., S.B.M., California.

Decision Affirmed

The above-named appellants have appealed from that part of the Hearing Examiner's decision dated August 16, 1965, determining the above-identified uranium lode mining claims null and void for lack of a discovery within the purview of the general mining laws.

1/ For purposes of the hearing, mining contests Nos. 05474-A and 05474-B were combined. At the hearing, the contestees and Mrs. Laurance withdrew their answer filed in Contest No. 05474-B, and the contestees appearing withdrew that part of their separate answer filed in Contest No. 05474-A relating to all contested mining claims therein except the Star Numbers 1 and 4 lode claims (Tr. 4-5). The mining claimants have not appealed from that part of the Hearing Examiner's decision determining the Star Placer Claim and the Star Numbers 2, 3, 5, 6, 7, 8, 9 and 10 lode claims invalid, and that part of the decision is now final. Consequently, the appeal now under consideration relates only to Contest No. 05474-A and only to the Star Numbers 1 and 4 lode claims.

2/ Mrs. Laurance was a contestee in Contest No. 05474-B, but she was never a party in Contest No. 05474-A. Both answers allege that Mr. Quilliman quitclaimed his interest in all of the contested claims to the other contestees, and, although he was served in both contest proceedings by publication, he filed no answer. It is uncertain whether the contestees' attorney also represented Mr. Quilliman at the hearing (Tr. 3). Nevertheless, Mrs. Laurance and Mr. Quilliman are both clearly identified as appellants in connection with this appeal.

Both mining claims in issue were located on April 3, 1955 by the contestees (Exhs. 1 and 2). The contest complaint charges, in pertinent part, that minerals have not been found within the limits of either claim in sufficient quantities to constitute a valid discovery. Messrs. Laurance, Scott, Sargent and Griffith filed a timely answer denying the allegation. On March 10, 1965, a hearing was held before the Hearing Examiner. One of the contestees (Mr. Sargent) appeared and testified personally, and the parties were represented by counsel.

Mr. Sargent testified that he and the other locators exposed approximately six pockets of radioactive material on the Star Number 4 claim, varying in width from 2 inches to 1½ feet wide within an area of 5,000 square feet (Tr. 39). The witness testified that the excessive radiation count with a nucleometer radiation counter (Tr. 36) was two to three times the background count 3/ or slightly more (Tr. 38). The locators removed samples of material and had some of them from the Star Number 4 claim chemically assayed (Tr. 53, 54, 55). Three assayer reports (Exhs. A, B, C) offered in evidence by the contestees show that three of the samples tested 0.11%, 0.03% and 0.083% uranium oxide (U_3O_8), respectively. Penciled on an envelope of "dust" (Exh. D) is a notation that the sample enclosed had a chemical assay of 0.12% uranium oxide, but the note was written by a contestee who is not a registered assayer and who was not present at the hearing for cross-examination (Tr. 47); therefore, Exh. D has little weight as evidence of an assay in the absence of corroboration. As to the other three assay reports, the contestee-witness was unable to state whether the samples tested were concentrations of material made before assay (Tr. 53), nor was he certain as to the size of the samples submitted for assay (Tr. 53, 54, 55, 56). No material from the claims has been sold (Tr. 56), nor have the mining claimants obtained information as to the cost of processing,

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3/ Background counts are pulses made by a counter when it is not near radioactive material, caused by cosmic rays and minute quantities of radioactive elements present in nearly everything. No count on any sample or deposit is significant until the background count for the general area is established, because the background count varies according to the sensitivity of the counter and according to the topography and geology of the area. See "Prospecting for Uranium" (Revised 1957) published jointly by the Atomic Energy Commission and the Geological Survey, pages 53 and 54.

concentrating and mining the material (Tr. 57). The witness testified that the mining claimants did have general plans to concentrate the material for sale (Tr. 48), but stopped when the Atomic Energy Commission discontinued its buying program in 1958 (Tr. 58); however, in April 1960 and April 1961 the claimants did make test holes and cuts for further exploration (Tr. 44), and they excavated for a proposed building on the site as late as May 1964 (Tr. 45).

As to the Star Number 1 claim, the contestee-witness merely testified that in a 15 foot test hole on this claim the radiation count was twice that of the surface background pulse (Tr. 41-42), but he stated no material was assayed from this claim because the material was different from that found on the Star Number 4 claim (Tr. 42, 56).

The contested mining claims were examined by a Bureau of Land Management geologist who has had considerable experience independently and as a former employee of the Atomic Energy Commission in making examinations for appraisals of "source materials" within the purview of the Atomic Energy Acts of 1946 and 1954 (42 U.S.C. § 1801 et seq. and § 2014 (1964), respectively). With the aid of contestee Sargent (Tr. 11), the Bureau geologist took two 1½ foot channel samples from improvements shown to him on the Star Number 4 claim (Tr. 15), and chemical analyses of these samples tested a mere 0.011% and 0.003% uranium oxide (U_3O_8), respectively (Exh. 6). The Bureau geologist testified that the samples he took were representative of the material found on the claim (Tr. 34). He took no samples from the Star Number 1 claim because the contestee did not indicate a sampling site and his Geiger counter showed no material warranting sampling (Tr. 13-14). The witness testified that his examination of the claims showed little radioactivity of background, no material worth further sampling, no deposits indicating a likelihood successful mining, and no evidence of metalliferous minerals (Tr. 20-21, 29). The witness testified that material worth sampling should have five to ten times the excessive radiation count over the normal background count, and he would not expect significant assays unless the count were twenty times more than the normal background count (Tr. 33). He stated that his second examination showed no substantial Geiger counter readings to warrant further sampling (Tr. 29).

The Bureau geologist also testified that he is familiar with the marketing provisions of the Atomic Energy Commission for uranium ore (Tr. 15). He explained that at present the Commission does not buy ore from producers, but only purchases concentrates from mills, and that the only ores eligible to participate in this market are those from properties having reserves established before November 24, 1958--other ore must compete in the free market (Tr. 16). The witness stated that prior to 1958 the minimum percentages of uranium saleable was 0.1% (Tr. 16-17), and now most mills have raised the requirements to ore of 0.15% to 0.20% miniumum uranium oxide, and the shipper must now assume the cost of freight (Tr. 17, 30). As to the mining claimants' plan to concentrate material to a higher percentage of uranium, the geologist explained that the Atomic Energy Commission buying program specified uranium ore in its original form with no beneficiation in the field, so the type of material exposed on the claim could not have thus been made eligible in any event (Tr. 75). The witness testified that the product on the claim is not a desirable product to treat, and mills would be unfavorable toward accepting it (Tr. 76).

A consulting mining engineer employed by the contestees testified that, in his opinion, all samples and assays taken by both parties are worthless (Tr. 72, 73, 74), not being representative samples (Tr. 65, 70). The contestees' witness agreed that the samples show minimum or less than minimum quality to have value, but suggested that because the samples were taken from the surface or near the surface the material may have become impoverished due to changes in the surface temperature (Tr. 65, 67, 69). This witness is of the opinion that exploration at depths of from 15 to 25 feet below the surface, and sampling of fresh exposures at approximately those depths is necessary (Tr. 69) to disclose the "true nature of the deposit" (Tr. 64). The witness admitted that he took no samples, explaining that after making his recommendations for further exploration (which he called "development") the mining claimants did not employ him further (Tr. 68).

The Bureau geologist then sought to refute the consulting mining engineer's testimony by testifying that his examination of the claims showed no evidence to support the theory that the material may have been impoverished (Tr. 77). The geologist explained that primary uranium is susceptible to leaching, and that ground water leaching of primary uranium minerals should result in secondary uranium minerals concentrating in fractures and interstitial fillings in sand as evidence of impoverishment (Tr. 79).

The Atomic Energy Commission and the Department of the Interior concur that mining locations on public land for source materials shall be subject to the requirements of the United States mining laws in the same manner as any locatable valuable mineral not a source material. See A. W. Kimball et al., 65 I.D. 166, 170 (1958). The general mining law (30 U.S.C. § 22 (1964)) provides, in pertinent part, that, except as otherwise provided, valuable mineral deposits in lands belonging to the United States shall be free and open to exploration and purchase. The evidence offered by the mining claimants at the hearing fails to rebut the showing by the Government that the mineral deposits on the contested mining claims are without value. The testimony is clear that there is no market for the exposed material at present. The Department has held that the finding of uranium of a grade so low as to have no economic value cannot be considered to be a valid discovery. See United States v. Robert A. Mindte et al., A-29151 (February 4, 1963). The appeal ignores the fact that the Bureau mineral examiner's best sample only assayed 0.011% uranium oxide, which is less than the grade of 0.061% uranium oxide material discussed in the Mindte decision. By disregarding this unfavorable evidence, the appellants are able to assert, in substance, that the Mindte decision is not applicable for the stated reason that it discusses material with less uranium oxide content than the 0.11% uranium shown by an assay of one of their samples. The first answer to this argument is that the assay results offered in evidence by the mining claimants cannot be properly evaluated, and must be given little weight, since their witness was unable to explain if it is not merely a concentration of material or to state the size of the original sample. Assay reports can only be interpreted in light of the manner in which the samples were taken, the extent of the minerals sampled and other pertinent facts. See United States v. Edwin R. Sauers et al., A-30097 (July 9, 1964). However, even though we accept the showing in a light most favorable to the mining claimants (that the sample is evidence that 0.11% uranium oxide is representative of the area from which it was taken), nevertheless, the cited principle of law from the Mindte decision is controlling since no test offered in evidence shows material on the contested claims of a sufficiently high grade (0.15% to 0.20% uranium oxide) to be likely for purchase by a mill at present.

The appeal refers to testimony that the mining claims are located on the San Andreas Fault and asserts that the fault is related to the deposit of uranium minerals on the claims. At best, such evidence could merely establish a geological inference, and the Department has never accepted a geological inference as a substitute for the discovery of a valuable mineral deposit. United States v. Melvin L. Nevitt, A-30030 (July 28, 1964) and the cases cited therein. To constitute a valid discovery upon a claim there must be actually and physically exposed within the limits of the claim a vein or lode of mineral-bearing rock in place, possessing in and of itself value for mining purposes. See East Tintic Consolidated Mining Claim, 40 L.D. 271 (1911). The contestees' consulting mining engineer was not, as alleged in the appeal, of the opinion that the exposed samples are a minimum representation of the actual uranium oxide on the claim; he merely testified that the mining claimants must explore deeper to learn the "true nature of the deposit." The recognition of evidence of minerals as sufficient to warrant further exploration does not establish the existence of a discovery; the nucleus of value upon which a discovery may be based must be such that, with actual mining operations under proper management, a profitable venture may reasonably be expected to result. United States v. Edwin R. Saurer et al., supra, and the cases cited therein.

The appellants argue that their samples tested sufficiently high grade uranium to have been purchased by the Atomic Energy Commission prior to the discontinuance of its purchasing program on November 24, 1958. As shown, the preponderance of the evidence offered at the hearing does not support this allegation. When the Government contests a mining claim it bears only the burden of going forward with sufficient evidence to establish a prima facie case (and the Bureau mineral examiner's testimony clearly established a prima facie case of no valid discovery); the burden then shifts to the claimants to show by a preponderance of the evidence, not merely evidence of equal weight, that the contested claim is valid. See

United States v. Swante C. A. Pirkola, A-30559 (June 29, 1966). Furthermore, such evidence as to the market prior to November 24, 1968, does not establish the required showing, by a preponderance of the evidence, that, under present circumstances, a person of ordinary prudence would expend substantial sums in the expectation that a profitable mine might be developed through the sale of material extracted and moved from the claim to a mill. See United States v. R. W. Wingfield, A-30642 (February 17, 1967). The Department held in United States v. Theodore R. Jenkins, A-30409 (March 1, 1966), that testimony in essence amounting to no more than an opinion that a prudent man would be justified in holding a mining claim as an investment in the hope that at some future time the market for the mineral on the claim will return does not satisfy the traditional test that a discovery exists only where minerals have been found of such character that a person of ordinary prudence would be justified in the further expenditure of his time, labor and means, with a reasonable prospect of success in developing a valuable mine. Castle v. Womble, 19 L.D. 455 (1894); Jefferson-Montana Copper Mines Co., 41 L.D. 320 (1912); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963).

A careful review of the contest record as compiled at the hearing shows no evidence as to uranium being exposed on the Star Number 1 mining claim but merely that a slight increase in radiation count over background pulse was shown on the nucleometer radiation counter. Accordingly, no discovery has been shown within the limits of the Star Number 1 claim.

As to the Star Number 4 claim, the evidence is uncertain as to whether any quantity of the material exposed on that claim was of sufficiently high grade to meet the minimum grade standards of the Atomic Energy Commission buying program prior to November 24, 1958. Furthermore, the evidence as to a possible use or market for such material after that date is so highly contingent and conjectural as to amount to nothing more than speculation. For the reasons stated, the Star Number 4 mining claim must also be declared invalid for lack of a discovery.

Accordingly, the decision of the Hearing Examiner is affirmed that both mining claims are null and void.

Messrs. Laurance, Scott, Sargent, Quilliman, 4/ and Griffith, and Mrs. Laurance, are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director,

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4/ Any party adversely affected may appeal to the Secretary from a final decision of the Director. See 43 CFR 1844.1. In the event Mr. Quilliman or Mrs. Laurance appeals, or is included in an appeal to the Secretary, it is proper that they show wherein the Bureau's decision is adverse to them, since the contest record as now compiled does not show their interests.

Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. Thus, if the appeal includes both mining claims adversely affected by this decision, the total filing fee will be $10. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed, the appellants will have the burden of showing wherein the decision appealed from is in error.

If an appeal is taken by the appellants, the attorney for the contestant who must be served as the adverse party is:

Office of the Regional Solicitor,
United States Department of the Interior,
Room 1020 Rowen Building,
458 South Spring Street,
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Newton Frishberg
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Appeals List No. 1
JHO'D

appeal to Sec
affirmed A-30984 6-3-68

In reply refer to:
704
Contest No. S-746-C-11

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 MAR 15 PM 2 47

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

March 12, 1968

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America, :
Contestant :
v. :
August Ebbert and :
Verdabelle Ebbert, :
Contestees :

Appeal from Decision of
January 18, 1968

Notice of Appeal Filed
February 27, 1968

Appeal Dismissed

The appeal of August Ebbert and Verdabelle Ebbert from the Hearing Examiner's decision dated January 18, 1968, must be dismissed because it was not transmitted to the Office of the Hearing Examiners, Sacramento, California, within the 30-day period following receipt of the Hearing Examiner's decision. The certified mail return receipt bearing the signature of August Ebbert shows that the decision was received on January 22, 1968, not January 23, as alleged by the contestee. The decision specifically pointed out that an appeal therefrom must be filed in the Office of the Hearing Examiners, P.O. Box 21-4215, Sacramento, California 95821, within 30 days from date of receipt of the decision. The 30-day period allowed by the regulations (43 CFR Subpart 1842) for taking an appeal ended February 21, 1968.

The notice of appeal in this case was mailed February 19, 1968, by certified mail postage prepaid, from Nevada City, California, in an envelope addressed to "Director, Bureau of Land Management, U.S. Department of the Interior, Federal and Courthouse Building, Sacramento, California 95814." The envelope was delivered to the Sacramento land office on February 20, 1968. It was not transmitted to the Office of the Hearing Examiners until February 23, and was received in the Office of the Hearing Examiners on February 27, 1968, after the termination of the 30-day period for taking an appeal.

No extension of time can be granted for filing the notice of appeal or paying the filing fee (43 CFR 1842.4(c)). That the notice of appeal in this case was erroneously sent to an incorrect office of this Bureau is not a mitigating factor in this situation. See Omar Stratman, A-30565 (February 23, 1966).

Dismissal of an appeal for failure to comply with the requirements of the regulations is mandatory.

Mr. and Mrs. Ebbert are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations contained in the enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D.C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers both mining claims adversely affected by this decision, the filing fee will be $10. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed, the appellant will have the burden of proving wherein the decision appealed from is in error. The adverse party to be served in the event of an appeal herefrom is Regional Solicitor, U.S. Department of the Interior, Box 21-4527, Sacramento, California 95821.

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

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DDRF 1, 2, 3
Ap. & He. R/F
Case File
Binder
DEH

appeal to Sec
affirmed A-30990 5-7-69

Mining Claims: Discovery 3413

To constitute a valid discovery on a mining claim there must be shown to exist within the limits of the claim a valuable mineral deposit, of sufficient quantity and quality, which would warrant a prudent man in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

United States v. Bryan Gould, Contest No. Sacramento 080492 (March 18, 1968)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 APR 17 AM 10 00

In reply refer to:
704
Contest No.
Sacramento 080492

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

March 18, 1968

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America, Contestant v. Bryan Gould, Contestee	:	Involving the Gould & Curry lode mining claim, located in the SE$\frac{1}{4}$ Sec.22, T. 25 N., R. 7 E., M.D.M., Plumas County, California (within the Plumas National Forest)

Decision Affirmed

Mr. Bryan Gould has appealed from a Hearing Examiner's decision, dated August 25, 1967, which declared his Gould & Curry lode mining claim invalid for the reason that the claim lacks a discovery of a valuable mineral deposit within the meaning of the mining laws.

This contest proceeding was initiated by a complaint issued by the Bureau of Land Management at the request of the Forest Service, U. S. Department of Agriculture. The complaint made the following charges:

> (1) There is not disclosed within the boundaries of the mining claim mineral materials of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery.
>
> (2) The land embraced in the claim is nonmineral in character.

At the hearing, Mr. Henry W. Jones, a duly qualified mineral examiner employed by the Forest Service, testified for the contestant. He made a cursory or reconnaissance examination of the claim on February 17, 1966. He made an examination on April 19, 1966, accompanied by the mining claimant and by Messrs. Charles Goughnour and M. E. Harris of the Forest Service. He again visited the claim on May 2, 1967, a few days before the hearing.

The claim was located for chromite. On the visit to the claim on April 19, 1966, Mr. Gould also claimed asbestos and gold values in the stream bed, in addition to chromite. Mr. Jones examined the features pointed out to him by Mr. Gould. He took a sample from the discovery cut and had it assayed. The assay certificate (Exh. 4) showed a chromite content of 1.98% and a chromium, iron ratio of 0.22 to 1. He said that this was an ordinary chromite and iron ratio that could be found in all peridotite type rocks in this particular area; that the 1.98% chromite would have no chance of recoverability; and that chromite can be sold if it approaches 40% or better, and it has to have a 3 to 1 chrome, iron ratio. Mr. Jones took two pan samples at the site of the 12-foot trench in the stream bed, concentrated them down and did not recover any gold values. He again took two pan samples from this point on May 2, 1967, but did not find any gold values. These areas were pointed out to him by Mr. Gould. There were no further workings on the claim on his May 2, 1967, visit. He expressed the opinion that a prudent man would not be justified in expending further time and money on the development of the claim.

On cross-examination, Mr. Jones testified that his pan samples were not taken from the stream bed itself but were taken from the pile of material that Mr. Gould had excavated from the stream and had thrown up on the bank by the side of the stream. When asked how he determined whether the material he tested for gold content was from the bottom or the top of the stream bed, he stated that he didn't determine where it was from, but "assumed if a person throws it out of a hole, the material at the bottom of the hole will automatically go on the top of the pile of dirt on the side," and that he did not know where the material he tested came from, "other than that it came from the vicinity of this pit that Mr. Gould had dug." He testified that he did not search for any gold on his own as Mr. Gould pointed this out as being the place that there might be gold values found. He stated that he did not decline to sample at any place that Mr. Gould asked him to sample.

Mr. Charles A. Goughnour, a Forest Service employee, testified for the contestant, introducing in evidence three photographs, two of which were views of the cabin on the claim, and one view of the 12-foot cut in the stream.

Mr. Minter E. Harris, a Forest Service mining engineer, testified that he accompanied Mr. Jones to the claim in April 1966. He examined the claim for asbestos. He found a very minor amount of asbestos, a seam an eighth of an inch across. He did not sample this, however, as there wasn't enough fiber left to justify sampling. He examined the assay certificate of the chromite sample (Exh. 4), stating that it indicated a minor amount of chromite and iron that you would expect to find in the rock type that was sampled, but it was not a commercial deposit of chromite. He expressed his opinion that a prudent man would not be justified in expending his time and money in the expectation of developing a paying mine. On cross-examination, Mr. Harris stated that he had been on the claim only the one time, and that he had not taken any samples.

The contestee, Mr. Bryan Gould, testified that he became actively interested in gold shortly after he left high school, and that he did some sniping up and down various streams, including the Feather River. In 1961 he went up in the Rich Bar-Mill Creek area, and sniped up and down the stream until he made a discovery. He said that he made a discovery of several minerals, including chromite and chrysotile asbestos, and although he located the claim as a lode claim for chromite, he felt that the more prudent mining to be done on the property for him, as a single individual, would be gold mining in the stream bed, and that is where he has put most of his efforts. Because he had surface rock he would have to do a lot more exploratory work to find out just what it would take to develop a paying mine, but it was worth exploring, and "that's all I need to develop a discovery on." (Tr. 66).

He completed the log cabin in late 1964 and has lived on the claim sporadically for a total of 2½ years since 1961. The cabin is used for housing himself and his wife and for storing tools. He testified that he was recovering gold from the stream through a sluicing operation, enough to support himself, and he considered himself prudent, because of the peculiarities of his character, to dig things out by hand and live a woods life outdoors, a rugged sort of existence, and be satisfied with a somewhat meager return for his labors. He thought there is sufficient mineral on the property, in value and quantity, to constitute a discovery.

Mr. Gould stated that he pointed out places for the Government mineral examiners to sample. One was the pile of material beside the stream bed. He expressed to them his opinion that the better values would be down deep, but they said that they were not required to dig down for any values.

On cross-examination, Mr. Gould said he also lived in San Francisco where he has a part-time job. He stated that he had sold some gold from the claim, but was unwilling to state to whom he sold the gold. He could not estimate how much gold he had recovered from the claim, or the amount of money he had received for it, and that he had recovered enough in tools and things, including food, that would allow him to live up there, enough to justify his mining. He gave a minimum estimate of 400 hours that he had spent on mining the claim, but could not place a dollar value on his labor, stating that the value of his labor is exactly what it takes to keep him alive and going in the place where he is living while mining.

Contestee's Exhibit A was a jar of black sands. Mr. Gould explained that the sands are concentrated sands out of his sluice box. The significance of the exhibit is only that he recovered gold from the sand. He took a sample of the sand and it assayed at $42.35 a ton in gold (Exh. B). It was a fire assay. Mr. Gould had no idea how much material he had worked or moved from the claim during his mining of it.

Mr. Harold J. Geddes, a part-timer miner and a structural steel worker by trade, testified for the contestee that he has a claim adjoining Mr. Gould's claim, that he has gold, chrysotile asbestos and several other minerals shown in the spectrographic analysis. He is mining now for gold and exploring for chrysotile asbestos. He considers Mr. Gould to be a reasonably prudent man in looking for gold on his claim because anybody who could get up there and work as hard as he has, evidently is a prudent man looking for something, or he wouldn't work that hard. He defined a prudent man looking for gold as "one who is willing to get out there and move rocks and look for it. When he finds a lead, why keep on going." At one time he had sniped for gold on the area of Mr. Gould's claim, and, although he had found some gold, he did not find any large quantities because if he had he would have staked it out himself, and he had a better showing on his claim.

Mr. Eldon Hamrick, a practicing miner, testified that he has a claim located about 2,000 feet from Mr. Gould's claim. He defined a prudent man looking for gold in this area as one who would be willing to live on beans, macaroni and rice, and work 12 to 16 hours a day, until he was able to find his strike.

Mr. True Wess, an equipment operator and miner, testified that he has a mining claim adjoining Mr. Gould's claim. He defined a prudent man as one who would be willing to work hard, and he felt that there are enough minerals and gold in this area that a person could make some sort of living off it. He never prospected on the area of Mr. Gould's claim because he figured he had enough land of his own without any more.

Mr. Henry W. Jones, recalled by the contestant as a rebuttal witness, estimated the amounts of material that had been removed from the cuts on the claim and these added up to a total of approximately 35 cubic yards. He examined the contestee's fire assay report of black sand (Ex. B), and stated that the amount of gold recovered could only be recovered by smelting, and that this would mean shipping the concentrates to the Selby smelter at a cost of approximately $20 per ton. He estimated an additional $5 per ton charged on the concentrates. He also estimated that by working at full speed a person could produce 4 or 5 yards of material a day, and each of these cubic yards would be expected to contain 10 to 20 pounds of black sand. He stated that 20 pounds of black sand per yard and 5 yards a day would amount to a daily output of 1/20th of a ton per day, and he estimated the workable placer deposit on the claim at approximately 6,000 cubic yards, the biggest percentage of which carries no gold or little gold.

When the United States contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case. The burden then shifts to the claimant to establish by a preponderance of the evidence that his claim is valid. Foster v. Seaton, 271 F. 2d 836 (D. C. Cir. 1959). The claimant must show that he has made a discovery of a valuable mineral deposit within the claim as prescribed by the mining laws. See 30 U.S.C. §§ 22 and 35 (1964). But value, in the sense of proved ability to mine the deposit at a profit, need not be shown. Adams v. United States, 318 F. 2d 861, 870 (9th Cir. 1963). The showing that must be made with respect to value in order to establish a valid claim, as stated in Castle v. Womble, 19 L.D. 455 (1894), and approved in Chrisman v. Miller, 197 U.S. 313, 322 (1905), and reaffirmed in Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963), is:

> . . . where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. (19 L.D. at 457).

In his appeal, the appellant contends that the contestant failed to present prima facie evidence of lack of discovery, asserting, in substance, that the mineral examination of the claim was very superficial, that the Government's mineral examiner took two pan samples on April 19, 1966, from gravel not known to him to have come from the bedrock region of the stream, and that he had declined to take samples directly from the locus of gold discovery pointed out to him by the contestee. The Government mineral examiner testified that he had taken the pan samples from the pile of material that Mr. Gould had excavated from the stream, and that Mr. Gould had pointed this out as being the place that gold values might be found. On the other hand, Mr. Gould testified that he had pointed out this pile of material as a place to sample, but that he also expressed to the mineral examiners his opinion that the better values would be down deep, but that the mineral examiners had stated that they were not required to dig down for any values.

The Department has repeatedly held that it is the duty of a mining claimant to keep discovery points available for inspection by Government mining examiners and that an examiner has no duty to rehabilitate discovery points or to explore beyond the current workings of the mining claimant. United States v. Lem A. and Elizabeth D. Houston, 66 I.D. 161, 167 (1959); United States v. Lucetta A. Hunt and Donald B. Hunt, A-28189 (February 29, 1960); United States v. George C. Johnson and Robert A. Johnson, A-30606 (October 25, 1966); United States v. Thomas C. Wells, A-30805 (January 8, 1968).

Although the mineral examination made by the Government's mineral examiners was, admittedly, somewhat superficial, we are nevertheless convinced that it was sufficient to establish a prima facie case. See United States v. Thomas C. Wells, supra, wherein the Department dealt with an analagous situation, but held that the Government had established a prima facie case. In the Wells decision, the Department quoted the following from United States v. George J. Patee et al., A-28731 (May 7, 1962):

> It is well established that in contesting the validity of a mining claim, the government is under no obligation to make the same extensive and exhaustive search of the lands and test of materials thereon as would normally be conducted by a prospector in search of a discovery. . . . /T/he Government is not obligated to prove either that the land is nonmineral or that no discovery of a valuable mineral deposit has been made. The function of the government is one of investigating for the purpose of verifying, if possible, the claimed discovery. If examination of materials taken from the land at "points of discovery" fails to establish the existence of deposits of a valuable mineral deemed sufficient to warrant a man of ordinary prudence in the further expenditure of time and money with a reasonable prospect of success in the development of a paying mine, a prima facie case has been established by the Government.

Furthermore, the Department held in United States v. Independent Quick Silver Co., 72 I.D. 367, 379 (1965) that, although a contest is subject to dismissal where the Government fails to make out a prima facie case, "nevertheless a mining claimant must have made a discovery within the limits of his claim in order to gain any right in the land as against the United States. . . ."

The appellant's second contention is that he has proved, by a preponderance of the evidence, a discovery of valuable gold deposits. He acknowledges that the "prudent man" test is an objective rather than a subjective one. He states that he testified to his willingness to pursue his venture, and that there can be no doubt as to the great physical and emotional energy spent by him on the claim, but he acknowledges that his subjective desire and dedication are legally irrelevant. With all of this, we agree. There is no doubt but that he has spent a great amount of time and energy on the claim searching for gold. Furthermore, it appears that Mr. Gould's testimony, as that of his witnesses, Messrs. Geddis, Hamrick and Wess, relative to the prudency of his venture, was more subjective than objective, as it was designed to fit Mr. Gould's own individual hopes and desires because of his willingness to dig things out by hand and live a woods life outdoors, a rugged sort of existence, and be satisfied with a somewhat meager return for his labors.

Mr. Gould argues that the record presents ample objective factual evidence of his prudence in developing the claim. However, none of his witnesses testified as to any mineral values on his claim, and his own testimony was inconclusive in that respect. He could not estimate how much gold he had recovered from the claim, or the amount of money he had received for the gold. There is nothing in the evidence to show that a prudent man would be justified in spending further time and money on the claim, with the reasonable expectation of developing a paying mine.

The appellant objected to the rebuttal testimony of the Government's mineral examiner concerning the shipping costs of material to the smelter, and other costs, with reference to the contestee's assay value in gold obtained through his fire assay (Exh. B). He asserts that this imposes a current market or profitability test, which is contrary to law, and that the freight rate of $20 per ton from the claim to the smelter might be greatly reduced if he trucked the ore himself. While the latter statement might be true, the record does not reflect that the contestee has refuted the mineral examiner's testimony in this respect. In Adams v. United States, supra, the court held that it is proper to consider the cost of extracting the mineral, not to ascertain whether assured profits are presently demonstrated, but whether under the circumstances a person of ordinary prudence would expend substantial sums in the expectation that a profitable mine might be developed. There is nothing in his decision to indicate that the Hearing Examiner employed a requirement of present or assured profitability. In his final conclusion, he said: "Where a mining locator uncovered evidence of mineralization but cannot demonstrate the extent of value of the deposits, and where further exploration or prospecting is necessary to determine whether mining development should be undertaken, a discovery within the meaning of the mining laws has not been made and the claim is null and void for want of discovery."

The Department has never said that the "prudent man" rule of Castle v. Womble, supra, requires a demonstration of profits as "a present certainty" in order to establish the existence of a discovery. To the contrary, in United States v. Ralph Fairchild, A-30803 (January 11, 1968), the Department said of the rule in Castle v. Womble:

> "A reasonable prospect of success" does not mean a sure thing. The word "prospect" itself does not connote a certainty. In Adams v. United States, 318 F. 2d 861 (9th Cir. 1963), Adams attacked a Departmental decision on the ground "that the agency decision required a demonstration on the part of Adams that the deposits could be worked at a profit." The court did not agree that the Department made such a requirement. It stated that the Department considered the relevant evidence "not to ascertain whether assured profits were presently demonstrated, but whether, under the circumstances, a person of ordinary prudence would expend substantial sums in the expectation that a profitable mine might be developed. The agency did not, in this regard, apply an improper standard." 318 F. 2d at 870.

> The examiner did not apply a standard of assured profitability. He applied no more than the rule in Castle v. Womble as the Department applied it in the Adams case. That is the rule as to what constitutes a discovery within the meaning of the mining laws.

See also United States v. C. B. Myers et al., A-30796 (November 21, 1967).

The appellant contends that the issue of his good faith was improperly submitted to the Hearing Examiner. Although considerable testimony was allowed in the record as to the cabin existing on the claim, there is no issue of good faith *per se* in the case. Such testimony and photographs permitted in the record have no bearing in this decision. Furthermore, it apparently had no bearing on the Examiner's decision for he stated, at page 8: "The contestee's good faith in locating the mining claim and prospecting and other mining activities is not at issue." Further, as the Hearing Examiner stated, the motivation of the United States in initiating the contest is not material. The Department of the Interior has been granted plenary power in the administration of the public lands, and until issuance of a patent, legal title to public lands in a mining claim remains in the Government; and the Department has power, after proper notice and upon adequate hearing, to determine the validity of a claim. Cameron v. United States, 252 U.S. 450 (1920); Best v. Humboldt Placer Mining Company, supra. The establishment of clear title to the lands is sufficient justification for the Department to initiate proceedin to ascertain the validity of unpatented mining claims on the public domain. Davis v. Nelson, 329 F. 2d 840 (9th Cir. 1964).

The appellant's last contention is that he is not required to prove a discovery of lode gold deposits. Apparently, this assertion is made because he was claiming a discovery of placer gold although the claim was located as a lode claim. We find nothing in the Hearing Examiner's decision to indicate that his declaration of invalidity of the mining claim was based to any extent on the fact that placer gold was indicated by the contestee as the mineral claimed, although the Examiner did state at the hearing that a placer mineral will not sustain a lode location and a lode mineral will not sustain a placer location. The formation of the deposit did not enter into his decision. We consider this contention as immaterial, as we have found that there is no discovery of gold, either placer or lode.

Accordingly, the Hearing Examiner's decision of August 25, 1967, is correct, and it is hereby affirmed.

Mr. Bryan Gould is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

If an appeal is taken, the adverse party to be served is:

Regional Attorney
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U. S. Department of Agriculture
630 Sansome Street
San Francisco, California 94111

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures (2)

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Office of the General Counsel, United States Department of Agriculture,
Washington, D. C.
Forest Service, U.S. Department of Agriculture, Division of Watershed
Management, Washington, D. C. (12)
Div. of L&M S&T (4)
Div. of L&M PM (2)
Appeals List No. 1
Gower Federal Service
OPD
PLS

appeal to Sec
affirmed A-30998 4-18-69

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

IN REPLY REFER TO:
704
S 1053-1056

BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 MAR 29 PM 2 27

MAR 28 1968

Certified Mail
Return Receipt Requested

Mr. Kenneth J. Campeau
Law Offices of Anixter & Aronson
500 Commercial Building
28 North First Street
San Jose, California 95113

Dear Mr. Campeau:

The allegations of abandonment of Power Project No. 2134 set forth in your letter of March 4 have been reviewed by the Federal Power Commission, which reported to us in its letter of March 21, that the records of the Commission fail to disclose any evidence in support of your allegations.

Accordingly, there is no reason to change the conclusions as to the Feather River Lime Nos. 1, 2, 3, and 5 lode mining claims of A. L. Snyder and Clarence E. Black (S 1053-1056, inclusive) set forth in our letter to you dated February 29, 1968.

Sincerely yours,

Frances A. Patton

Frances A. Patton
Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

cc: SD (California)
    LO (Sacramento) ✓

appeal to Sec
affirmed A-30998 4-18-69

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1968 MAY 2 AM 10 00

Mining Claims: Discovery 3413

> The record does support a finding that no discovery has been shown on the contested mining claims where the claimants, without offering credible evidence, merely allege that there is a valuable deposit of minerals on the claims, but fail to open the discovery points so that a Government mineral examiner can evaluate the purported deposit, and where the mineral examiner testifies that, based upon his observations, he is of the opinion that no mineralization of value is exposed on the claims.

United States v. Taylor and Alice Crossland, Contest No. Sacramento 079997 (April 3, 1968)

In reply refer to:
704
Contest No. Sacramento 079997

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

April 3, 1968

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America, Contestant, v. Taylor Crossland and Alice Crossland, Contestees-Appellants.	:	Patzircon (also known as the Pat Zircon, Painted Post and #3388) and Red Ledge Placer Mining Claims located in sec. 12, T. 6 S., R. 21 E., M.D.M., California, within the Sierra National Forest.

Decision Affirmed

Mr. and Mrs. Crossland have appealed from the Hearing Examiner's decision dated December 4, 1967, which held that the above-identified mining claims are null and void for the reason that a deposit of valuable minerals does not exist within the confines of either claim.

The mining contest was initiated at the request of the Assistant Regional Forester (California Region), Forest Service, United States Department of Agriculture. A hearing was held before the Hearing Examiner on August 8, 1967. The contestant was represented by the Office of the General Counsel, Department of Agriculture; Mr. Crossland appeared personally and was represented by counsel.

Mr. Crossland testified that he is of the opinion that there are valuable mineral deposits of gold, silver, uranium and rare earths on the subject mining claims (Tr. 5). There has been no mining on either claim (Tr. 6, 17). The contestees offered in evidence an unsigned copy of a letter (Exh. A), addressed to one Sam Mobley (and not the mining claimants), which states that an assay showed that a certain sample, removed from an unknown place on the Red Ledge claim by a person not a witness, contained 1.06 ounce of gold and 1.85 ounce of silver when assayed (Tr. 35-37). The Hearing Examiner properly advised the claimants that the document has questionable evidentiary weight (Tr. 35-36). In the absence of an explanation as to the method of obtaining the sample, the exact location of the sample within the limits of the claim, and the quantity of material at the place from which the sample was removed, a sample is meaningless and the letter regarding the assay of it cannot be interpreted. See United States v. Swante C. A. Pirkola, A-30559 (June 29, 1966); United States v. Edwin R. Saurers, A-30097 (July 9, 1964).

Mr. Crossland testified that his opinion that there is a valuable mineral deposit on the claims is based upon assay reports shown to him by Sam Mobley (Tr. 34), and an assay report that the witness cannot find (Tr. 5). The contestees did not offer an explanation as to the contents of the assay reports or the sampling procedure used. Mr. Crossland testified that he has samples of materials found in the area, but not on the claims in issue, which have a fluorescent quality under ultraviolet light (Tr. 34). Evidence as to material found outside the limits of the contested mining claims, if identified and explained in greater detail, could show a geological inference concerning the claims in issue, but a geological inference has never been accepted as a substitute for the actual discovery of a valuable mineral deposit exposed within the limits of the mining claims. See United States v. Melvin L. Nevitt, A-30030 (July 28, 1964); United States v. New Park Mining Company, A-28530 (January 25, 1961). There was no credible evidence adduced at the hearing of recoverable values of any kind found on either mining claim.

A mining engineer employed by the Forest Service testified that he had examined both claims on several occasions, once in the presence of Mr. Crossland and Sam Mobley (Tr. 10). The mining claimant offered to open some discovery points for the mineral examiner, but, although the latter waited for two years, none have been opened (Tr. 10-11). Where the Government has challenged a mining claim, it becomes incumbent upon a claimant to maintain his claim and discovery points in such a manner that they may be examined and evaluated by a Government mineral examiner. United States v. Orion L. Fenton, A-30621 (January 9, 1967). The mining engineer testified that the only improvement on either claim that might relate to mining activity is a hole, eight feet in diameter and about a foot deep, on the Patzircon claim—the hole is covered with grass and has trees growing out of it (Tr. 12, 14). The Government mineral examiner had no duty to explore beyond current workings in an effort to verify the purported discovery. He is not required to prospect the claims. See United States v. Thomas C. Wells, A-30805 (January 8, 1968). If the claimants rely upon mineralization in a covered discovery point, they had the responsibility to open this discovery so that it can be evaluated by the Government mineral examiner in connection with this adverse proceeding. United States v. R. W. Wingfield, A-30642 (February 17, 1967).

The Forest Service mining engineer traversed the claims with a scintillation counter (Tr. 21, 26). He also examined the claims visually and removed samples from both claims and had spectrographic analyses made of such samples (Exh. 7). However, the values shown for uranium, gold, silver, rare earths, and numerous other minerals tested, were either non-existent or so slight as to have no value for mining purposes (Tr. 15, 16). The mining engineer testified that his examination and the test results cause him to believe that no valuable mineral deposit exists on either claim (Tr. 16, 26).

The appellants assert that the Hearing Examiner's decision is not supported by the evidence adduced at the hearing. The Department has held that the testimony of a qualified mining engineer that he has examined the contested claims, using approved procedures, and is of the opinion based upon his observations that no mineralization was exposed on the claims is sufficient to establish a prima facie case; such evidence, if unrebutted, warrants a finding that no discovery was shown. See United States v. Adam J. Flurry, A-30887 (March 5, 1968); United States v. Frank Coston, A-30835 (February 23, 1968). Thus, the Government at the hearing did establish a prima facie case, and the burden then shifted to the claimants to show by a preponderance of the evidence that their claims are valid. United States v. Consolidated Mines and Smelting Co., Ltd., et al., A-30760 (September 19, 1967). The contestees must bear the consequences of their failure to offer any credible evidence to demonstrate a discovery on either mining claim. The contest record clearly supports the Hearing Examiner's finding that no discovery has been shown on the claims.

The appeal contains an unsupported assertion that in fact there exists on the claims deposits of gold, silver and uranium of sufficient quantity to establish a valid discovery within the boundaries of both claims. The hearing provided the contestees with an opportunity to rebut the showing of the mineral examiner and offer evidence to support their allegation that a mineral deposit of value exists on the claims. The record of this hearing consists of the transcript of testimony and exhibits, together with all papers and requests filed in the hearing. 43 CFR § 1850.0-8(a)(1); United States v. Arch Little et al., A-30842 (February 21, 1968). Since the record does not evidence a valuable deposit of mineral on either claim, the mere assertion that such a deposit exists is not sufficient to warrant changing the decision appealed from.

The appellants state that improvements have been placed on the claims. Assessment work can confer no right in the absence of a discovery, for the requirement relating to such work is in the nature of a condition subsequent to a perfected and valid claim and has nothing to do with locating or holding a claim before discovery. United States v. Mobley et al., 45 F. Supp. 407, 410 (D. Calif. 1942). [1] A valid property right to a mining claim is acquired only upon the discovery of a valuable mineral deposit. United States v. Eloise A. Overton, A-30822 (February 16, 1968). No amount of labor or improvements will validate the mining claims in the absence of the required showing of a discovery.

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[1] One of the contestees in the Mobley case is the locator of the Patzircon and Red Ledge claims, and the decision involves land less than a mile from the claims now in issue (see Exhs. 1-A, B, C, 2-A). The pertinent facts of the Mobley case and the present proceeding are not dissimilar.

Finally, the appellants allege that the lands are mineral in character. As explained in the decision appealed from, since the existence of a discovery on the lands has not been demonstrated, there is no need to consider whether the lands are mineral in character for the reason that a favorable determination of that issue alone would not validate the claims. United States v. R. B. Johnson, A-30405 (October 29, 1965).

Accordingly, the appellants have not shown error in the Hearing Examiner's decision, and that decision is affirmed.

Mr. and Mrs. Crossland are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D.C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. Thus, if the appeal includes both mining claims adversely affected by this decision, the total filing fee will be $10. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed, the appellants will have the burden of showing wherein the decision appealed from is in error.

If an appeal is taken by Mr. and Mrs. Crossland, the attorney for the adverse party who must be served is:

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Room 860
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San Francisco, California 94111.

Frances A. Patton
Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures (2)
Dist. on page 5

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Office of the General Counsel, Division of Lands and Forestry, U.S.D.A.,
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Forest Service, Division of Watershed Management, U.S.D.A., Washington,
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Hearing Examiner John A. Wood (Sacramento)
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Gower Federal Service
Appeals List No. 1
JHO'D

appeal to Sec
affirmed A-30810- 1-24-68
List 2-9-68

DOCKET FILES

Mining Claims: Discovery 3413

A lode mining claim is properly declared null and void for lack of discovery where only insignificant gold and silver values have been found on the claim.

Hearings Procedures: Generally 1850

It is proper to deny a motion to dismiss a contest proceeding on the ground that the mining claim involved is not on public land where all the evidence from the cadastral surveys and land office tract books shows the subject claim to be on public land.

United States v. Sidney M. Heyser, et al., Contest No. 05918 (Riverside)
(April 4, 1967)

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1967 MAY 1 AM 10 00
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UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In Reply Refer to:
704
Contest No. 05918
(Riverside)

April 4, 1967

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DECISION

United States of America, Contestant
v.
Sidney M. Heyser and Esther M. Heyser, Contestees

Involving the High-Wide and Handsome lode mining claim, situated in Sec. 33, T. 28 S., R. 34 E., M.D.M., Kern County, California, within the Sequoia National Forest.

Decision Affirmed

The above-named contestees have appealed from a decision of a Hearing Examiner dated October 27, 1965, which declared their High-Wide and Handsome lode mining claim null and void for the reason that a valid discovery of a valuable mineral had not been made within the limits of the claim, and which also denied their motion to dismiss the proceeding on the ground that the subject mining claim is not on public land.

The mining contest proceeding was initiated on behalf of the United States at the request of the Regional Forester (San Francisco, California), Forest Service, United States Department of Agriculture, by the filing of a complaint alleging that a discovery of a valuable mineral deposit does not exist within the limits of the claim. The contestees filed a timely answer denying the charge, and separately alleging that the contestant has no jurisdiction in this matter under 43 CFR Part 1850. A hearing was held at Los Angeles, California, on June 8, 1965. At the hearing the contestant was represented by the Office of the General Counsel, United States Department of Agriculture, San Francisco, California, while the contestees appeared personally but without counsel.

The case record discloses that the High-Wide and Handsome lode mining claim was located September 3, 1939. The location notice makes no mention of the mineral for which the claim was made. The claim is within the Sequoia National Forest, approximately one mile southeast from the French Meadow Guard Station.

The contestees moved to dismiss the proceeding on the grounds that the High-Wide and Handsome lode mining claim is not located on public land, and the Department of the Interior has no authority to consider its validity. In support of their motion to dismiss, the contestees offered a quitclaim deed dated February 13, 1958, from the United States to George I. Scofield, his heirs and assigns. The deed reconveyed all the right, title or interest which the United States may have acquired by virtue of that certain deed executed by George I. Scofield on July 17, 1899. The quitclaim deed described the land involved as "all section 33, T. 28 S., R. 34 E., M.D.M., California, containing 640 acres."

George I. Scofield had deeded the described land to the Government as a basis for a forest lieu selection under the act of June 4, 1897 (30 Stat. 36). Where the application or selection has been canceled, Section 6 of the act of April 28, 1930 (46 Stat. 257) authorizes the Secretary of the Interior or such officer as he may designate, to execute a quitclaim deed of the conveyed land to the party or parties entitled thereto.

Because an overlap between T. 28 S., R. 34 E., and T. 29 S., R. 34 E., M.D.M., was verified by a Government investigation authorized in 1929, an independent resurvey was made of T. 28 S., and a dependent resurvey was made of sections 1 to 6, inclusive, T. 29 S.

As a result of the resurveys, shown in plats of survey accepted March 3, 1943, the tier of sections formerly designated section 31 to 36, inclusive, T. 28 S., is now designated as sections 1 to 6, inclusive, T. 29 S. The former section 33, T. 28 S., R. 34 E. (patented to the Southern Pacific Railroad Company), was designated as Tract 40 in T. 29 S. (being within sections 3 and 4). French Gulch, which ran through section 28, T. 28 S., in the plat of the original survey approved January 20, 1883, is depicted in section 33, T. 28 S., in the plat of the resurvey accepted March 3, 1943. It was stipulated by the contestees, without dissent from the contestant, that the High-Wide and Handsome lode mining claim is within the area shown as section 33, T. 28 S., R. 34 E., M.D.M., in the plat of survey accepted March 3, 1943. The Hearing Examiner concluded that the land deeded to the Government in 1899 as section 33, T. 28 S., R. 34 E., M.D.M., was never accepted by the Government and so remained at all times private land; that the quitclaim deed from the United States to George I. Scofield dated in 1958 did in fact reconvey whatever interest the Government might have had in the same land as described in the deed of 1899; that the land reconveyed to George I. Scofield is now designated as Tract 40, T. 29 S., R. 34 E., M.D.M.; that section 33, T. 28 S., R. 34 E., M.D.M., is public land; and that the mining claim at issue is within the boundaries of section 33, T. 28 S., R. 34 E., M.D.M., as it now exists. Accordingly, the Hearing Examiner denied the motion to dismiss.

Following a thorough review and study of the case record, we find that the Hearing Examiner briefly but adequately summarized the pertinent facts adduced at the hearing and, by official notice, extracted from the tract books, approved plats of survey and other public records of the Department of the Interior. We find it sufficient merely to restate these salient points from his decision.

The contestant's case was presented by the testimony of Mr. Westley G. Moulton, a mining engineer employed by the Forest Service. Mr. Moulton testified that he had examined the subject mining claim on September 9, 1963, accompanied by Mr. and Mrs. Heyser, the claimants. He stated that the claim was in the basic granites of the Sierra Nevada Range, and that where pressure fractures had occurred the quartz replacement frequently contained gold. Mr. Moulton described an old tunnel caved at its portal and so incapable of entry, and a newer tunnel some 50 feet long, but that he had found no mineralization in this tunnel. The claimant had opened a pit, supposedly to expose a quartz vein, but Mr. Moulton stated that he did not observe such a vein in the pit. Mr. Moulton took samples of rock from the above-mentioned pit and from a quartz streak about an inch wide in the roadway near the pit, and had the samples assayed for gold and silver. The pit sample showed assay values of $2.45 for gold and $0.89 for silver per ton. The roadway sample showed assay values of $1.75 for gold and $0.75 for silver per ton. Mr. Moulton then testified that these assay values must be reduced by a minable width of at least 30 inches, which would reduce the value per ton of material removed to approximately five cents. Mr. Moulton expressed his opinion that the minimum value of material removed from this lode mining claim would have to be $15 per ton to permit any profitable removal of gold or silver. Mr. Moulton stated that from his examination of the High-Wide and Handsome lode mining claim, it was his opinion that a prudent man would not be justified in spending time and money on the claim in hopes of developing a paying mine.

The contestees' case was presented by Mr. Sidney M. Heyser, one of the contestees. Mr. Heyser testified that the pit examined by the Government's mining engineer was not a discovery pit, but was merely a place where prospecting had shown ore of value. He further testified that no ore was uncovered at the time of the Government's examination in September 1963, and that no ore had been taken from the claim by him at any time, but that his exploration had convinced him that the claim was a good prospect which a prudent man might develop into a profitable operation.

The following legal principles govern with respect to the pertinent facts adduced at the hearing, relative to the discovery of a valuable mineral deposit.

The location of "valuable mineral deposits" in lands belonging to the United States is authorized by the mining law. 30 U.S.C. § 22 (1964) Although such deposits are not defined in this law, the Department, with judicial approval, has consistently adhered to the definition of value laid down in Castle v. Womble, 19 L.D. 455, 457 (1894); Best, et al. v. Humboldt Placer Mining Company, 371 U.S. 334 (1963), that minerals must be found and the evidence must be of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. In the case of a lode claim the elements necessary to establish a valid discovery are (1) that there must be a vein or lode of quartz or other rock in place, (2) that the quartz or other rock in place must carry gold or some other valuable mineral deposit, and (3) that the two preceding elements when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in an effort to develop a valuable mine. Jefferson-Montana Copper Mines Co., 41 L.D. 320 (1912).

The discovery required by the mining laws means more than a showing only of isolated bits of mineral not connected with or leading to substantial values. United States v. John L. Cooper, et al., A-30267 (May 11, 1965). The contestees may be justified in performing further exploratory work in the hope of finding valuable minerals but exploratory work is not discovery. The mere willingness of a mining claimant to expend more time and money in an effort to develop his claim is not enough. United States v. Ben Fullingim and John Tinkle, A-28850 (September 18, 1962). As the Department said in the Cooper case, supra, "The Department has held that there is a distinct difference between exploration and discovery under the mining laws. Exploration work is that which is done prior to discovery in an effort to determine whether the land contains valuable minerals. It is only when the exploratory work shows that minerals exist in such quantities and such values that there is a reasonable prospect of success in developing a paying mine that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery had been made. United States v. Clyde R. Altman and Charles M. Russell, 68 I.D. 235 (1961)." Furthermore, the Cooper case, supra, held that when a mining claim is located in a national forest (as in this case), the mining claimants are required to show the mineral values they claim by clear and unequivocal evidence.

From the evidence submitted the Hearing Examiner concluded that the contestees' mining claim was null and void for lack of discovery. He held that the Government met its burden by establishing a prima facie case as to the invalidity of the mining claim, and that the contestees failed to prove the validity of the claim by a preponderance of evidence, as required by Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959).

The appellants state the only issue in this proceeding is to determine the location of section 33, T. 28 S., R. 34 E., M.D.M., at the time the original deed was granted /Scofield to the United States in 1899/. The appellants contend the Hearing Examiner erred in his ruling that the High-Wide and Handsome lode mining claim is situated on public land, asserting that the resurvey of T. 28 S., R. 34 E., did not consider all available information. Their argument is not easy to follow, but it apparently is based on the delineation of the rectangular survey net for Ts. 28, 29 S., R. 34 E., on a topographic map published by the United States Geological Survey. The appellants aver that the High-Wide and Handsome lode mining claim was located within section 33, T. 28 S., R. 34 E., as that section was shown on the plat of survey approved January 20, 1883, and that the mining claim now is in the south half of section 33 as it is delineated on the plat of survey accepted March 3, 1943. They contend the south boundary of T. 28 S. could not have been shifted south more than half a mile by any resurvey which correctly considered all earlier surveys, including the 1894 survey of township boundaries by I. N. Chapman.

The records of the Bureau's Division of Engineering disclose that the overlap between Ts. 28 S. and 29 S. in R. 34 E., was known before 1900, and was developed through investigations by W. O. Owen in 1906 and by Q. Campbell in 1917-1918. Further discrepancies in the original survey of T. 28 S., R. 34 E., were developed through investigations by T. Vandermeer in 1931. Resurvey of T. 28 S., R. 34 E., was authorized by the Commissioner of the General Land Office in memorandum 729936 "E" WHR dated January 17, 1936. Special instructions were issued February 18, 1936 under Group 233, California, directing a dependent resurvey of the 7th Standard Parallel South as originally surveyed by Carlton in 1876 as the north boundary for T. 29 S., R. 34 E.; establishment of standard corners for T. 28 S., R. 34 E., on this line; subdivision of T. 28 S., R. 34 E., based on a sectional correction line established from the section corner for sections 25 and 36, T. 28 S., R. 34 E., section 19 and 30, T. 28 S., R. 35 E., metes and bounds surveys of patented areas in T. 28 S., R. 34 E., based on the corners established in the Norway survey of 1883 and designation of the parcels by Tract numbers; and resurvey of the north tier of sections in T. 29 S., R. 34 E., to accomodate the tracts segregated as land patented under land descriptions in T. 28 S., R. 34 E. The surveys were executed by F. Wayne Forrest, a surveyor employed by the General Land Office, and are delineated on plats of survey designated as "T. 28 S., R. 34 E., M.D.M., Independent Resurvey and Tract Segregations," and "T. 29 S., R. 34 E., M.D.M., Dependent Resurvey, sections 1 to 6, inclusive, and Tract Segregations," each accepted March 3, 1943 by the Commissioner of the General Land Office. The 7th Standard Parallel South is correctly shown where it was originally established by Carlton as the north boundary of T. 29 S., R. 34 E., M.D.M.

The area described as section 33, T. 28 S., R. 34 E., in the plat of survey approved January 20, 1883 was returned as Tract 40 (being within sections 3 and 4, T. 29 S., R. 34 E.) on the plat of survey accepted March 3, 1943. The field notes of the survey of Tract 40, executed by Forrest, recite that Tract 40 is described as all of section 33, T. 38 S., R. 34 E., designated as Southern Pacific Railroad land and patented, and the metes and bounds survey of the Tract began at the original corner of sections 27, 28, 33, 34, T. 28 S., R. 34 E., and ran thence westerly through the original quarter corner for sections 28 and 33, to the original corner for sections 28, 29, 32, 33, thence southerly through the original quarter corner for sections 32 and 33 to record distance, thence easterly to record distance, thence northerly through the original quarter corner for sections 33 and 34, to the place of beginning, thus segregating Tract 40 in T. 29 S., R. 34 E., in the same position and form as the original section 33, T. 28 S., R. 34 E., occupied on the surface of the earth.

The Secretary of the Interior is authorized, and is under a duty, to consider and determine what lands are public lands, what public lands have been or should be surveyed, and what public lands have been or remain to be disposed of by the United States, and he had the authority to extend or correct the surveys of public lands as may be necessary. Burt A. Wackerli, et al., 73 I.D. 280 (1966).

The Hearing Examiner was correct in his finding that section 33, T. 28 S., R. 34 E., M.D.M., as shown on the plat of survey accepted March 3, 1943 is public land, and in denying the motion of the contestees to dismiss this proceeding on grounds that the High-Wide and Handsome lode mining claim is not on public lands.

Apparently relying solely on their contention that the High-Wide and Handsome lode mining claim is situated on private land, the appellants did not appeal from the Hearing Examiner's declaration that the High-Wide and Handsome lode mining claim is null and void for lack of a valid discovery. Absent a reversal of his finding that the subject lode mining claim is on public land, the Hearing Examiner's determination that the High-Wide and Handsome lode mining claim is null and void for lack of a valid discovery has become final.

Even though the question of no discovery is not part of the appeal, review of the complete record of the proceeding would constrain us to affirm the Hearing Examiner's decision that the High-Wide and Handsome lode mining claim is null and void for reason of no discovery of valuable mineral within the limits of the claim as correct under the applicable law and regulations.

The decision appealed from is affirmed.

Mr. Sidney M. Heyser and Mrs. Esther M. Heyser are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

If an appeal is taken, the adverse party to be served is:

Regional Attorney
Office of the General Counsel
United States Department of Agriculture
630 Sansome Street - Room 860
San Francisco, California 94111.

Frances A. Patton

Acting Chief, Office of Appeals and Hearings

Enclosures

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Forest Service, United States Department of Agriculture, Division of Watershed Management, Washington, D. C. (12)
Office of Hearing Examiners, Sacramento
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Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Gower Federal Service
Appeals List No. 1
DEH

appealed to Sec. Affirmed A-30840 11-13-67

DOCKET FILES

Mining Claims: Determination of Validity: Lands Subject to:
Withdrawn Land 3400.1, 3400.4

Mining claims located on lands embraced in a withdrawal which precludes mineral entry are properly declared null and void _ab initio_.

Although a mining claimant may not have any rights based on locations made subsequent to a withdrawal of the land, he is not precluded from establishing that he has possessory rights, as the successor in interest of an original locator, based on mining claims made and perfected prior to the withdrawal.

Richard R. Fancher et al., Sacramento 079789 (April 5, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 MAY 1 AM 10 00

In reply refer to:
704
Sacramento 079789

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

April 5, 1967

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Richard R. Fancher, Tilford H. Fancher and Martin G. Hughes, Mining Claimants	:	Involving The Tumble Down, The Mary Gold, The Barbara Ellen, The Hill Top, The Irene L., The Grace E., and The Florence M. mining claims located within section 4, T. 10 N., R. 9 E., and section 32, T. 11 N., R. 9 E., M.D.M., El Dorado County, California.

Decision Affirmed

Messrs. Richard R. Fancher, Tilford H. Fancher and Martin G. Hughes have appealed from a decision of the Sacramento, California, land office, dated September 13, 1965, which declared their above-named mining claims null and void *ab initio* because the lands were withdrawn from mining at the time the claims were located.

The record reveals that the claims were located on July 1, 1958; that all of the lands are included in a first form reclamation withdrawal under the act of June 17, 1902 (32 Stat. 388), effective September 14, 1942; and that portions of the lands are in a withdrawal for Power Project EP-1455 made under Section 24 of the Federal Power Act of June 10, 1920 (16 U.S.C. §§ 818), effective September 21, 1937.

As the withdrawals precluded mining locations, the locations made in 1958 are null and void *ab initio*. See *J. Everett Nelson*, A-29174 (February 4, 1963), and *John H. Lawrence et al.*, A-30321 (February 3, 1965). Therefore, the land office decision of September 13, 1965 is correct in declaring these particular locations invalid, and it is hereby affirmed.

The appellants contend that the land office decision is incorrect as they are, in actuality, claiming title as successors under a chain of title to "The Delores Group," which claims were located in the late 19th century covering the same lands as the above-named claims, and that the names were changed in 1958 only for a sentimental reason.

In *J. Everett Nelson*, *supra*, with respect to an analagous situation the Department said:

> However, although the claims located in 1934 are void, whether considered to be original locations or amended locations of

> earlier claims, the appellant would not lose his rights in any such earlier claims to which he succeeded in interest. But, for the appellant to be considered as having possessory rights against the United States with respect to such earlier claims, he will have to come forward with adequate evidence to establish that the claims were in fact located prior to the date of any withdrawal of the lands from mining locations, that he is the true successor in interest of the original claimants having an unbroken chain of title from them, and that the lands claimed by him are the same lands as those originally located. If he can establish those facts, then other questions will have to be considered such as whether the original claims were perfected by reason of a valid discovery before the withdrawal and whether any rights were lost by abandonment before there can be a final determination as to the appellant's rights with respect to such claims.

The appellants have in their appeal endeavored to set forth such evidence as that called for in the above-quoted paragraph from the Department's decision in the Nelson case. From an analysis of their appeal and the supporting statements by certain parties attached thereto, although they have not furnished complete evidence, we are of the opinion that they have at least furnished prima facie evidence that they are claiming under a chain of title to locations pre-dating the withdrawals.

Therefore, when this decision becomes final the case will be remanded to the California State Director for consideration of this evidence and for further appropriate action in consonance with this decision.

Messrs. Fancher and Hughes are each allowed the right of appeal herefrom to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers all mining claims adversely affected by this decision the total filing fee is $35. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Frances A. Patton

Acting Chief,
Office of Appeals and Hearings

Enclosures

Dist. on page 3

DISTRIBUTION:
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Mr. Tilford H. Fancher (Certified Mail)
Mr. Martin G. Hughes (Certified Mail)
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Div. of L&M S&T (4)
Div. of L&M PM (2)
Admin. Asst., Hearings
Gower Federal Service
Appeals List No. 1
OPD
PLS

appeal to Sec Appeal dismissed A-30811
11-21-67

DOCKET FILES

Multiple Mineral Development: Act of July 23, 1955 - Verified Statement 3512.9

It is proper to deny a request for reinstatement of a withdrawn verified statement received after the expiration of the 150-day period set forth in the published notice to mining claimants.

Loy William Sockman, Riverside 04922-G (April 12, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 APR 26 AM 10 00 (3)

In reply refer to:
704
Riverside 04922-G

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

April 12, 1967

Certified Mail
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DECISION

Loy William Sockman : Verified Statement

Decision Affirmed

Mr. Loy William Sockman has appealed from a decision of our Riverside district and land office dated May 6, 1965, which denied his request for reinstatement of a withdrawn verified statement filed in a proceeding under section 5 of the Act of July 23, 1955 (69 Stat. 367; 30 U.S.C. § 613 (1964)), and relating to the Independence No. 1, Independence No. 2, Lava Monster, Big Pine, Jumbo, and Goodale placer mining claims.

The appellant asserts that he was aware of the necessity for filing the verified statement and that he did not knowingly withdraw it. He requests that the original verified statement be reinstated and the mining claims be restored to their prior status.

The record shows that a verified statement Riverside 04922-G relating to the Independence No. 1, Independence No. 2, Lava Monster, Big Pine, Jumbo, Goodale, and other placer mining claims not pertinent to the proceeding, in W½ section 8, NW¼ section 17, T. 12 S., R. 34 E., S½ section 13, SE¼ section 14, E½ section 23, N½ section 24, T. 11 S., R. 33 E.,. M.D.M., California, was timely filed November 23, 1964 by Loy William Sockman in response to a notice to mining claimants first published July 23, 1964 pursuant to section 5 of the Act of July 23, 1955, supra, at the request of the Forest Service, United States Department of Agriculture. The land involved is within the Inyo National Forest. On April 5, 1965, the Regional Forester transmitted a withdrawal of the verified statement, signed by Loy William Sockman and dated April 2, 1965. The land office accepted the withdrawal of the verified statement by decision dated April 26, 1965. The claimant, by letter dated May 4, 1965, asked for reinstatement of the verified statement. The land office letter decision of May 6, 1965, denied the request of Mr. Sockman for reinstatement of the withdrawn verified statement.

The record disclosed nothing to indicate any impropriety in the withdrawal document, so the land office correctly accepted it and declared the Forest Service, U. S. Department of Agriculture, to have authority under section 4 of the Act of July 23, 1955, (30 U.S.C. § 612 (1964)), to manage the vegetative and other surface resources on the subject unpatented mining claims, and terminated the proceedings as to these claims.

The Act of July 23, 1955 allows only 150 days from date of first publication of a notice to mining claimants within which to file a verified statement. The Department has consistently held it to be improper to allow any additional time after the expiration of the 150-day period provided by statute for augmenting or correcting any verified statement as originally filed. See R. D. Compton, et al., A-30206 (July 2, 1964). The Department also has established a firm policy that a withdrawal of an application received over the signature of the applicant takes effect from the moment it is filed and the rights of the applicant are at an end eo instante even though the withdrawal might have been filed by mistake. See Lauren W. Gibbs, 67 I.D. 350 (1960). So in this case, the withdrawal of the verified statement signed by Loy William Sockman terminated his right to claim any rights contrary to the limitations set forth in section 4 of the Act of July 23, 1955, supra. As the 150-day period within which such verified statements may have been filed has long since expired, there is no authority under statute to permit reinstatement of the withdrawn verified statement. Denial of the request for reinstatement of the verified statement was proper, and it is hereby affirmed.

Accordingly, it is determined that the mining claimant has no right or title to, or interest in, or under, the said mining claims which may be asserted contrary to or in conflict with the limitations and restrictions specified in Section 4 of the Act.

Thus the United States has the right, prior to issuance of patent to these mining claims, to manage and dispose of the vegetative surface resources and to manage other surface resources thereof within the limitations and restrictions of Section 4 of the Act. Any use of the surface of the said mining claims by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto. Subject to the limitations and restrictions of Section 4 of the Act, the mining claimant herein may continue prospecting operations upon the mining claims and may develop any mineral deposits found therein.

Although a mining claimant may not have any rights to manage vegetative and other surface resources on his unpatented mining claims, he is not precluded from perfecting the mining claims and obtaining patent thereto. Upon issuance of patent, he will receive the right to manage and dispose of the vegetative and surface resources as well as the mineral estate in the lands.

Mr. Loy William Sockman is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 3127. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers all six mining claims adversely affected by this decision, the total filing fee will be $30. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error. If an appeal is filed, the adverse party to be served is the Regional Forester, Forest Service, U. S. Department of Agriculture, 630 Sansome Street, San Francisco, California 94111.

Frances A. Patton
Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION
Loy William Sockman (Certified mail)

Regional Forester, U.S.D.A. San Francisco
Forest Service, U.S.D.A., Div. of Watershed Management (12)
Div. L&M S&T (4)
Div. L&M PM (2)
OPD
GS, Cons. Div. (3)
Gower Federal Service
Appeals List No. 1
DEH

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 MAY 3 AM 10 00

Potassium Leases and Permits: Extensionsof Permits 3142.4

Where the permittee of a potassium prospecting permit has failed to drill or perform other comparable prospecting on the permit area during the initial two-year term of his permit, it is proper to reject his application for an extension.

Where prior to the termination of a potassium prospecting permit the lands embraced by the prospecting permit are included in an application filed by a Federal agency requesting withdrawal of the lands from the operation of the public land laws, including the mineral leasing laws, a subsequent late-filed application for extension of the prospecting permit must be rejected, since the filing of the application for withdrawal and its notation on the land office records segregates the lands from the lands available for lease or permit under the mineral leasing laws.

George D. Rowan, Sacramento 079275 (April 17, 1968)

In reply refer to:
704
Sacramento 079275

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

April 17, 1968
CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

George D. Rowan : Potassium
:

Decision Affirmed, as Modified

George D. Rowan has appealed from a decision of the Sacramento land office, dated November 28, 1967, which rejected his application for a two-year extension of potassium prospecting permit Sacramento 079275 for the reason that the request for extension was filed late.

The record shows that the appellant's potassium prospecting permit was issued for a period of two years from September 1, 1965, subject to a single two-year extension upon approval and upon the showings and conditions prescribed in 43 CFR 3142.4. The permit provided that prospecting by core drilling or other acceptable methods is authorized. The cited regulation provides, *inter alia*, that potassium prospecting permits may be extended for a single period of two years if the permittee has drilled at least one adequate test well on the permit area or performed other comparable prospecting prescribed in the permit during the two-year period for which the permit was issued, and that the application for extension must be filed within the period beginning 90 days prior to the date of expiration of the permit. The permit terminated on September 1, 1967. The request for extension of the permit was not filed until October 23, 1967.

The appellant admits that through his own inadvertence he failed to timely file his application for the extension of his permit. He asserts that, since the lands included in his application for extension, together with other lands held by him under another Government permit and a private lands lease, comprise the entire area of Paoha Island in Mono Lake, he should, therefore, be allowed to continue his plans for prospecting the entire island. He alleges that portions of the lake adjacent to the island on the east, south and west are held under State permits of the Geothermal Resources International, Inc., which he believes, in the event of a major discovery of geothermal steam thereon, will yield brines with high potash content and result in a vast commercial development of the island. Appellant urges that the permit be extended in view of the costly studies and plans he has made for the whole area.

Contrary to the implications in appellant's reasons for appeal, the Regional Mining Supervisor of the Geological Survey, Salt Lake City, Utah, reported on November 9, 1967, not only that the application for extension was filed late, but also that the records of his office, "as of September 1, 1967, do not disclose any money having been spent on the permithold during its initial term of 2 years."

We find that failure on the part of the appellant to prospect the lands within the permit, as required by the terms of the permit and regulation, is a more cogent reason for the rejection of the application for extension.

Further, the record shows that the lands described in the application for extension, among other lands, under the provisions of 43 CFR 2311.1-2(a), have been temporarily segregated from settlement, location, sale, selection, entry, lease, and other forms of disposal under the public land laws, including the mining and the mineral leasing laws, pursuant to an application of the Bureau of Land Management requesting the withdrawal of said lands by reason of their being valuable for geothermal resource development. The application for the withdrawal was noted on the records in the land office on February 7, 1967, and its revision was noted therein on March 23, 1967. The latter was published in the *Federal Register* on March 24, 1967. 32 F.R. 4506. As a consequence, the tract here involved is segregated from the operation of the mineral leasing laws.

In a situation where there was no application on file for the withdrawal of lands potentially valuable for geothermal development, the Department, in rejecting potassium prospecting permit applications for the lands, held (syllabus):

> The determination as to whether or not a potassium * * * prospecting permit should be issued for a particular tract of land is committed to the discretion of the Secretary of the Interior, and the Secretary may properly reject an application for such permit upon a finding that issuance of the permit would not be in the public interest during a period in which policy is being formulated for the utilization of geothermal steam, the release of which would necessarily be involved in the exploitation of the potassium * * * resources present, even though the land may otherwise be subject to the Mineral Leasing Act. *Joseph I. O'Neill*, A-30488 (Supp.) (December 7, 1966).

The decision appealed from is affirmed, as modified herein.

Mr. Rowan is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

Newton Frishberg
Chief, Office of Appeals
and Hearings

Enclosures 2
Dist. on page 3

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OPD
GS, Cons. Div. (9)
Gower Federal Service
Appeals List No. 1
WHW

appeal to Sec
affirmed A-30822
2-16-68

DOCKET FILES

Mining Claims: Discovery 3413

It is proper to hold a mining claim null and void where the evidence does not show the discovery of a valuable mineral deposit which would justify a prudent man in the further expenditure of time and money with a reasonable prospect of success in an effort to develop a valuable mine.

United States of America v. Mrs. Eloise Overton, Contest No. 095-C-6 (Riverside) (April 21, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 MAY 18 AM 10 00

In reply refer to:
704
Contest No. 095-C-6
(Riverside)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

April 21, 1967

Certified Mail
Return Receipt Requested

DECISION

United States of America, :
Contestant :
:
v. :
:
Mrs. Eloise Overton, :
Contestee :

Desert King No. 1, also known as Dessert King No. 1, lode mining claim located in unsurveyed Sec. 26, T. 4 S., R. 12 E., S.B.M., Riverside County, California.

Decision Affirmed

Mrs. Eloise Overton has appealed from a decision of a Hearing Examiner dated March 3, 1966 which declared the Desert King No. 1 lode mining claim null and void for the reason that the claim lacks a discovery of a valuable mineral deposit within the meaning of the mining law.

The contest proceeding was initiated on behalf of the United States at the request of the District Manager, Bureau of Land Management (Riverside, California), by the filing of a complaint which alleged (a) that minerals have not been found within the limits of the claim in sufficient quantity to constitute a valid discovery and (b) the land embraced within the claim is nonmineral in character. The contestee filed an answer timely denying the allegations, and a hearing was held at Los Angeles, California, on November 13, 1964. At the hearing the contestant was represented by the Office of the Regional Solicitor, United States Department of the Interior (Los Angeles, California), and although the contestee did not appear, she was represented by counsel. Depositions by the contestee and her witnesses were subsequently entered into the record.

The case record shows that the Desert King No. 1 lode mining claim was located March 25, 1918 by Peter Lehnhard and Thornton Taylor. The claim is within Joshua Tree National Monument, established by Presidential Proclamation of August 10, 1936, and is situated in unsurveyed section 26, T. 4 S., R. 12 E., S.B.M., approximately 30 miles east from Indio, California. The claim is located in granitic rocks, having minor fissures, and their alluvial debris.

The Hearing Examiner, after hearing testimony and receiving evidence, sustained the charge of no discovery set forth in the complaint, and declared the Desert King No. 1 lode mining claim null and void for lack of a discovery of a valuable mineral deposit within the meaning of the mining laws. The Hearing Examiner did not reach the second charge in the complaint relating to the mineral character of the land.

In her appeal Mrs. Overton contends, in essence, that the contestant did not make a prima facie case; that the only witness for the contestant was biased in favor of the contestant by virtue of employment; that the decision is contrary to evidence adduced by the contestee's witness; that the alleged agreement between the United States and Mrs. Overton executed in 1943 was ignored in the proceeding; and that a request for a joint sampling order was summarily denied.

We have reviewed the entire case record and, with the contentions of the appellant firmly in mind, summarize the pertinent facts in this proceeding. They are adequately, though briefly, set forth in the Hearing Examiner's decision.

The contestant's case was presented through the expert testimony of Mr. Edward F. Cruskie, a valuation engineer (mining) employed by the Bureau of Land Management. Mr. Cruskie testified that the exact location of the claim had been described to him by a brother of the co-locator Thornton Taylor, and that he had examined the claim in January 1962 and November 1963. He found workings which included a 60-foot tunnel trending across a fissure in granite which cut a 3-inch vein of clay material and granitic rubble, several pits about 1 foot deep and one pit about 12 feet deep. He testified that there was no mineralization in the way of sulphides, copper stain, visible minerals or gold. He stated that he found nothing worth sampling at the end of the tunnel, nor in a 10-foot cut at the edge of the tunnel or in a 3-inch wide clay seam in the tunnel, as there was no evidence of any mineralization. None of the surface cuts showed any width of quartz, although there was some bull quartz in the area. Mr. Cruskie stated there were some seams and streaks of kaolinized feldspar in the granite near the portal of the tunnel, but in his opinion the land was not mineral in character. On cross-examination, Mr. Cruskie stated that he had not entered the 12-foot shaft on the claim, and reiterated that he took no samples because he "didn't find anything worth sampling." On re-direct examination, he testified that he had seen an old assay report, alleged to relate to this claim, which reflected 2/10% copper and slight value for silver, but that he would call an area producing such low values "nonmineral."

The deposition of Mr. Harvey W. Gamel, a witness for the contestee, was taken on March 19, 1965. Mr. Gamel stated that in 38 years' employment as a chemist by the National Lead Company he had obtained considerable experience in analyzing metals consisting of copper, tin, lead, zinc and various other minerals, and that he had also performed electrolytic, fire and wet assays. He asserted that he had visited the subject mining claim several times circa 1930, and had removed samples aggregating 20 to 25 pounds each time from a "hanging wall of lime and copper calcium carbonate (green malachite copper)." He stated that his own assays of the samples indicated traces of gold and silver, but showed 20% copper. He indicated that his analysis was based on the assay of 1-gram samples of rock pulverized to 200-mesh. He asserted that he had secured an assay report from Backerstock and Payne, an assaying firm in Los Angeles, but the records of these assays were destroyed by fire in 1935.

The depositions of Mrs. Eloise Overton, the contestee, and of Mr. Paul H. Overton, her husband, were taken on October 29, 1965. Mrs. Overton stated that she had never been on the subject mining claim. She alleged that in 1943 she had signed an agreement prepared by the Bureau of Land Management that she was to retain all right, title and interest in the mineral rights of the claim, but that she was not to work the claim commercially without express consent of the Bureau because it was within the Joshua Tree National Monument extension. She asserted that she had been advised that she would be compelled to give up all her rights to the claim unless she signed the agreement. She stated that she did sign an agreement and that the Bureau retained all copies. (A search of the Bureau records in 1964 failed to confirm the existence of any such agreement.)

Mr. Paul H. Overton stated that, in June 1953, in the company of Mr. Sparky Kaiser, he went to a location that Mr. Kaiser asserted was the subject mining claim. At a campsite there he took some samples from the talus accumulated near the opening of a 12 to 20 foot vertical shaft. The assay report of the samples, dated June 2, 1953, a copy of which was submitted to the Bureau of Land Management, indicates a copper content of 0.20% and a silver content of 1.24 ounces per ton. (Exh. No. 7). On cross-examination Mr. Overton stated that he had relied on Mr. Kaiser's recollection that the subject claim was at the site of the vertical shaft. He stated that he did not see any inclined shaft, although he had been informed that a sample of mineral containing 20% copper had allegedly been taken from such a working presumably on the subject claim. He admitted that he had not revisited the claim since 1953.

The location of "valuable mineral deposits" in lands belonging to the United States is authorized by the mining law. 30 U.S.C. § 22 (1964). Although such deposits are not defined in this law, the Department, with judicial approval, has consistently adhered to the definition of value laid down in Castle v. Womble, 19 L.D. 455, 457 (1894); Best, et al. v. Humboldt Placer Mining Company, 371 U.S. 334 (1963), that minerals must be found and the evidence must be of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. In the case of a lode claim the elements necessary to establish a valid discovery are (1) that there must be a vein or lode of quartz or other rock in place, (2) that the quartz or other rock in place must carry gold or some other valuable mineral deposit, and (3) that the two preceding elements when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in an effort to develop a valuable mine. Jefferson-Montana Copper Mines Co., 41 L.D. 320 (1912).

The discovery required by the mining laws means more than a showing only of isolated bits of mineral not connected with or leading to substantial values. United States v. John L. Cooper, et al., A-30267 (May 11, 1965).

From the evidence submitted the Hearing Examiner concluded that the contestee's mining claim was null and void for lack of discovery. He held that the Government met its burden by establishing a prima facie case as to the invalidity of the mining claim, and that the contestee failed to prove the validity of the claim by a preponderance of evidence, as required by Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959).

Until such time as patent is issued for a mining claim, title to the lands belongs to the United States. The claim would be valid against the United States if there had been a discovery within the limits of the claim, if the lands are still mineral in character, and if all other statutory requirements have been met. Best, et al., v. Humboldt Placer Mining Company, supra. But so long as the legal title remains in the United States, the Government does have the power, after proper notice and a hearing, to determine whether the claim is valid, and if found invalid to declare it null and void. Cameron v. United States, 252 U.S. 450 (1920).

When the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case. The burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid. Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959); United States v. Swante C. A. Pirkola, A-30559 (June 29, 1966).

Review of the testimony in the record establishes that no probative evidence was adduced to support the contention of the appellant that a discovery of valuable mineral deposits exists within the limits of the subject claim. The witness Gamel stated that he had taken grab samples only from a vein alleged to have been exposed in an inclined shaft but he was unable to state whether the vein was consistent through the claim. The witness Overton stated that he had been one time only to what was alleged to be the claim, and he did not see any inclined shaft or exposed vein. The description of the claim workings by the contestee's witnesses bears little resemblance to the descriptions given by the contestant's witness, who testified that he identified the claim from information in the office files and from the brother of the original co-locator.

The record supports the Hearing Examiner's findings, in substance, that no probative evidence was presented to show mineral values in such quantity as would warrant further effort and expenditure with a reasonable expectation of developing a paying mine on the claim, that the Government established a prima facie case that there has not been discovery of valuable minerals within the meaning of the mining laws, and that the appellant has not shown by a preponderance of the evidence that discovery has been made on the claim of a valuable mineral deposit.

The Hearing Examiner properly declared the Desert King No. 1 lode mining claim null and void for the reason of no discovery of a valuable mineral deposit within the limits of the claim.

In this proceeding the claimant had notice of the hearing and ample opportunity to take samples singly or jointly with the contestant's mineral examiner before the hearing. Refusal of the Hearing Examiner to order a joint sampling by both parties after the hearing cannot be considered to be arbitrary in the light of all the circumstances surrounding this case, especially as the requested joint sampling could have been accomplished before the hearing if the claimant had been diligent. See United States v. J. W. Riesing, et al., A-30474 (January 18, 1966).

The burden of proving an allegation of prejudice or bias is necessarily on the party making the charge. Mere statements of conclusion are not sufficient to overcome the presumption that a Government mining engineer has not abused this discretion in performing his delegated duties and authority, particularly when it is shown that he is acting upon substantial evidence and exhaustive study of the circumstances involved. A mineral examiner employed by the Government is not disqualified nor will his testimony be set aside in a mining contest upon a charge of prejudice in the absence of a showing of bias. Cf. United States v. Ford M. Converse, 72 I.D. 141 (1965).

The decision appealed from is affirmed.

Mrs. Eloise Overton is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error. If an appeal is taken, the adverse party to be served is Regional Solicitor, United States Department of the Interior, Room 7759 Federal Building, 300 North Los Angeles Street, Los Angeles, California 90012.

Newton Frishberg
Chief, Office of Appeals and Hearings

Enclosures 2

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DEH

DOCKET FILES

Mining Claims: Determination of Validity 3400.1

A mining claim properly found invalid for want of a discovery of a valuable mineral deposit is properly declared null and void.

United States v. Wilfred E. Haick, Contest 0170935-C-288 (Los Angeles)
(April 24, 1967)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 MAY 12 PM 2 22 ③

In reply refer to:
704
Contest 0170935-C-288
(Los Angeles)

April 24, 1967

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

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DECISION

United States of America, :
Contestant
:
v.
:
Wilfred E. Haick,
Contestee - Appellant :

Art #2 placer mining claim, situated in section 14, T. 32 S., R. 38 E., M.D.M., Kern County, California

Decision Affirmed

Mr. Wilfred E. Haick has appealed from a Hearing Examiner's decision dated September 15, 1965, which declared the Art #2 placer mining claim null and void for lack of discovery of a valuable mineral deposit and held that the lands within the claim are nonmineral in character.

The contest proceeding was initiated on behalf of the United States at the request of the Bureau of Land Management, by the filing of a complaint alleging that the land embraced in the Art #2 placer mining claim is nonmineral in character and that minerals have not been found within the limits of the claim in sufficient quantity to constitute a valid discovery. The contestee timely filed an answer denying the allegations. A hearing was held in Los Angeles, California, on November 17, 1964, March 10 and May 20, 1965. At the hearing the contestant was represented by the Office of the Regional Solicitor, United States Department of the Interior, while the contestee appeared pro se without counsel.

The case record reflects that the Art #2 placer mining claim was located August 10, 1960 on S½NW¼NW¼ section 14, T. 32 S., R. 38 E., M.D.M., approximately 2 miles north from Castle Butte and about 18 miles northeast from Mojave, California. The claim was located for gold-bearing placer gravels.

The Hearing Examiner, after hearing testimony and receiving evidence, sustained the charges in the complaint, holding the Art #2 placer mining claim null and void for lack of discovery of a valuable mineral deposit and the land within the claim to be nonmineral in character.

The appellant contends the contestant did not establish a prima facie case that no valid discovery of mineral had been made and further that the contestee did meet the burden of proof showing that he had made a valid discovery.

Bearing these contentions of the appellant in mind, we have reviewed the entire case record and summarize the pertinent facts adduced in the hearing. They are concisely, but adequately, set forth in the Hearing Examiner's decision.

The contestant's case was presented at the hearing session held November 17, 1964, through the expert testimony of Fred S. Boyd, Jr., a Valuation Engineer (Mining), employed by the Bureau of Land Management. Mr. Boyd testified that he had examined the Art #2 placer mining claim in 1961, and on July 8 and November 15, 1964, identifying the claim from the established northwest section corner of section 14, T. 32 S., R. 38 E. He described the claim as being covered by alluvial material, sand and gravel, derived by erosion from the quartz monzonite country rock and tertiary volcanics in the area. He stated the only workings visible on the claim were three shallow bulldozer pits, each 45 to 50 feet long, 6 to 8 feet wide, and about 2½ feet deep. He took a channel sample from each pit, which he concentrated by panning. He then examined each of the three samples by use of a hand lens for evidence of colors of gold, by ultra violet lamp for evidence of scheelite, and by geiger counter for evidence of radio-activity. He declared that he found no affirmative evidence of any minerals and so had no fire assays made from any of the samples, as the values per cubic yard would be too low to be of any economic value or significance. He stated that in his opinion and based on his examination of the claim, his training and experience, the land in the Art #2 placer mining claim was nonmineral in character and that mineral values in sufficient quantity to constitute a discovery had not been demonstrated.

At a subsequent session of the hearing on May 20, 1965, on cross-examination Mr. Boyd testified that, on April 7, 1965, he had taken new samples from the Art #2 placer mining claim and had sent the samples from each of the three pits to Eisenhauer Laboratories for fire assay. He stated that panning of other samples from the pits again showed no free gold in the concentrate, but the fire assay reflected values for gold and silver of from 37 to 81 cents per ton (Exh. 6). He reiterated his opinion that the land was nonmineral and that no discovery had been made, as fire assays for any granitic samples usually show small values for gold and silver.

The contestee testified that he had sampled from three pits he had hand dug to a depth of approximately 3 feet in the western half of the claim, and had a fire assay made. He was unable to tell how or whether the samples were combined into a single sample, but assumed they had been combined as the assay certificate he entered as evidence reflected the results of assay for only a single sample of material. The certificate, from Eisenhauer Laboratories, showed a value of $13.30 for gold and $1.75 for silver per ton (Exh. A).

The establishment of a valid placer mining claim is contingent upon the discovery of "valuable mineral deposits" in a form other than a vein or lode (30 U.S.C. §§ 22, 35 (1964)). Under the mining laws one may take possession of vacant public land open to location under those laws and, after filing notice of location, retain possession against all, except the Government, while he is in diligent prosecution of his efforts to discover valuable minerals therein, but, when the Government withdraws its consent to such location, either by withdrawing the land from the operation of the mining laws or by institution of adverse proceedings against a mining claim, the locator must show that he has made a discovery of valuable mineral deposits within the limits of the claim in order to retain his possession. United States v. Everett Foster, et al., 65 I.D. 1 (1958).

In this case the Government challenged the recital of discovery and a review of the record shows that at the hearing it made a prima facie case that no valuable deposit of mineral was exposed on the claim. It was thereupon incumbent upon Mr. Haick to establish as a fact that a valid discovery had been made. See Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959); United States v. Swante C. A. Pirkola, A-30559 (June 29, 1966).

The Department has consistently adhered to the definition of discovery laid down in the "prudent man" test, Castle v. Womble, 19 L.D. 455, 457 (1894), approved in Chrisman v. Miller, 197 U.S. 313 (1905), and reaffirmed by the Supreme Court in Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963), which is:

> "where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of * * * /_ a discovery_/ have been met." 19 L.D. at 457.

A valid discovery under the mining laws requires more than a finding of mineral indications that would not warrant development work but only further exploratory work to determine if a valuable mineral deposit exists on the claim. United States v. Frank J. Miller, 59 I.D. 446 (1947); United States v. John L. Cooper, et al., A-30267 (May 11, 1965). The Department has clearly distinguished exploration and development as they relate to discovery under the mining laws. Exploration work is that which is done prior to discovery in an effort to determine whether the land contains valuable minerals. Where minerals are found, it is often necessary to do further exploratory work to determine whether those minerals have value, and where the minerals are of low value, there must be more exploration work to determine whether those low-value minerals exist in such quantities that there is reasonable prospect of success in developing a paying mine. It is only when the exploratory work shows this that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made. United States v. Clyde R. Altman and Charles M. Russell, 68 I.D. 235 (1961); United States v. Edgecumbe Exploration Company, Inc., A-29908 (May 25, 1964); United States v. Henault Mining Company, 73 I.D. 184 (1966).

To overcome the prima facie case presented by the contestant, it was necessary for the contestee to present a preponderance of the evidence in support of his position. This he did not do at the hearing, contrary to the contention in his appeal. The contestee admitted his lack of training in mining engineering matters, but professed only a hope that the claim was valuable for gold. His method of sampling for his assay certificate was not explained as indicative of widespread existence of mineral values. The contestee's case consisted solely of the assay certificate showing the results of a fire assay of samples allegedly taken from the mining claim. It reflected values for gold and silver. However, the document is entitled to slight consideration as it was not clearly supported by evidence as to the manner of sampling and the extent of the mineralization alleged to exist. See United States v. Northern Pacific Railway Company, 1 F. 2d 53 (1924).

We are persuaded that the relatively insignificant values indicated by the contestant's several samples are more representative of the extent of the mineralization on the claim. The evidence fully supports the conclusions of the Hearing Examiner that the land within the claim is nonmineral in character and that no discovery of a valuable mineral deposit has been made within the limits of the claim.

The decision of the Hearing Examiner declaring the Art #2 placer mining claim null and void is affirmed.

Mr. Wilfred E. Haick is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error. If an appeal is taken, the adverse party to be served is Regional Solicitor, United States Department of the Interior, 7759 Federal Building, 300 North Los Angeles Street, Los Angeles, California 90012.

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

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Gower Federal Service
Appeals List No. 1
DEH

appeal to Sec
affirmed A-30823 3 copies recvd.
9-27-68

DOCKET FILES

Mining Claims: Discovery 3413

A valid discovery under the mining law requires more than a finding of mineral indications which would not warrant development work but only further exploratory work to determine if a valuable mineral deposit exists in a claim.

Mining Claims: Common Varieties of Minerals 3511

Sand and gravel deposits suitable for road base, asphalt mix and concrete aggregate without expensive processing but which are used only for the same purposes as other widely available, but less desirable, deposits of sand and gravel are common varieties of sand and gravel and not locatable under the mining laws since these facts do not give them a special, distinct value.

A mining claim is properly held invalid because the sand and gravel for which it was located are common varieties not subject to location even though such action prevents disposal of small quantities of gold and silver found with the sand and gravel.

United States v. Mt. Pinos Development Corp., Riverside Contest No. 06666 (May 3, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 MAY 15 AM 10 00

In reply refer to:
704
Riverside Contest
No. 06666

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

May 3, 1967

Certified Mail
Return Receipt Requested

DECISION

United States of America, Contestant v. Mt. Pinos Development Corporation, Contestee	: : : :	Involving the Dry Creek No. 1 placer mining claim located in Secs. 4, 5 and 9, T. 7 N., R. 19 W., S.B.M., Ventura County, California (within the Los Padres National Forest).

Decision Affirmed

The above-named contestee has appealed from a Hearing Examiner's decision, dated August 24, 1966, which declared its Dry Creek No. 1 placer mining claim null and void because it lacks a valid discovery of a valuable mineral deposit within the meaning of the mining laws.

The contest proceeding was initiated at the request of the Forest Service, United States Department of Agriculture, by a contest complaint containing the following allegations: (1) A discovery of a locatable material has not been made and maintained, and (2) The land is non-mineral in character. The contestee denied these allegations, affirmatively alleging as follows:

> That the discovery of locatable mineral materials on said Dry Creek No. 1 Placer Mining Claim includes sand and gravel from grass roots to depth of 200 feet in drill holes without bedrock bottom, from which drill hole 33 samplings taken every few inches, in all 200 feet of depth, show continuous deposits of sand and gravel of the same grade and quality as at the grass roots, many of the samplings contain traces of gold, sufficient to warrant further prospecting for the gold content of the sand and gravel deposit; further, the drilling of the 200 foot hole discovered water in sufficient quantity to rise in the drill hole to within 70 feet of the surface, sufficient with further exploration to be used in the washing of the sands and gravel in the recovery processing operation for various uses for industry and manufacture. (Underscoring added).
>
> That the deposit of sand and gravel on Dry Creek No. 1 claim is of such character and economic values as to exclude it from the "common varieties" of mineral materials and make it

> commercially suitable and valuable for use in a manufacturing, industrial, or processing operation described in Part 185.121(b), General Mining Regulations, issued September 7, 1962 by John A. Carver, Jr., Acting Secretary of the Interior.

The following facts were established from the testimony and documentary evidence adduced at the hearing, which was held on March 14 and 15, 1966: The claim, which was located on November 8, 1963, contains an extensive deposit of sand and gravel, "quite a few million yards" according to a Government witness. The California State Division of Highways has tested the deposit by drilling holes and bulldozing pits on the claim and has found the material to be suitable for road bed material, including Portland cement and asphalt concretes (contestee's Ex. A). There are other sand and gravel deposits within a distance of 5 to 7 miles from the claim. On February 17, 1964, the contestee entered into an agreement with the State of California giving the State a non-exclusive "Grant of Right to Take Material for Highway Purposes." (contestant's Ex. 14). This agreement provided for the removal of up to 3,000,000 tons of material from the claim at a royalty of 10 cents per ton. The material is to be used in construction of the Golden State Freeway between Lebec and Los Angeles. The claim is near the freeway. The contestee thus has a ready market for some of the material in the construction of the highway and also a possible potential market for the material for construction of the proposed Pyramid Rock Dam, the site of which is located about 13 miles from the claim, as well as for construction of the proposed Carley Porter Tunnel, a unit of the State's Feather River Project.

The contestee introduced in evidence as Exhibit B an Agreement of Lease which it entered into with the Littlerock Aggregate Co., Inc., wherein the contestee agreed to sell to Littlerock an undetermined amount of sand and gravel. This agreement provided for the right of the contestee to erect, operate and maintain such equipment as it desires for the purpose of extracting rare minerals from the sand and gravel located on the claim and that its equipment may be operated in conjunction with Littlerock's crushing plant and other equipment.

The sand and gravel deposit contains some gold, although the evidence is conflicting as to the amount. Dr. Mitchell A. Light, a qualified geologist, testified in behalf of the contestee. He took numerous samples from the claim and had them assayed for gold. Seven samples were taken from various depths in the well on the claim; four of the samples contained gold values of 10 cents per ton; two concentrated samples were valued at 15 cents and 53 cents per ton; and one sample at $20 per ton (contestee's Ex. M, page 9). Numerous samples were taken from other parts of the claim. Four composite samples ranged from a trace of gold to 35 cents per ton (Ex. N). Three composite samples were valued at 70 cents, 88 cents and $1.05 a ton (Ex. O). Other samples taken from various pits were concentrated by panning. The concentrates contained gold values ranging from a trace to $9.10 per ton (Exs. P, Q).

In his report of examination of the property, dated August 10, 1964 (Ex. M), Dr. Light stated on page 1 that "Gold, in at least traceable quantities, has been found throughout the depth of the test,[1] thus verifying the gold-bearing nature of the deposit;" that "Pilot plant placer gold mining operations should be instituted to further explore the gold resources" and "The marketability of the commercial sand and gravel should be pursued;" and further stating "In regard to the gold mining, it should be developed in a manner which is most amenable to the sand and gravel plant placed in operation at the site. In the event that no sale of the sand and gravel to private or government customers is anticipated in the near future, it is recommended that the pilot plant operation, on a modest scale, be put into effect as soon as is feasible." He also stated at page 9 that "Because of the very nature of placer deposits it would /be/ completely unwarranted to project the economic or noneconomic status of the property on the basis of gold alone."

Mr. William L. Johnson, a qualified mining engineer, testified for the contestant that he took a channel sample from each of four back-hoe pits. The samples were panned and the concentrates assayed at gold values ranging from 0.3 cent to 2.6 cents per ton (Ex. 15).

The Hearing Examiner concluded that the sand and gravel deposit on the claim is not a valuable mineral deposit within the meaning of the mining laws and, since the sand and gravel is not subject to location, the gold values on the claim must be sufficient to satisfy the so-called prudent man rule of discovery; that representative samples of the material in place contain recoverable gold values such as would not warrant development; and, therefore, a valuable mineral deposit has not been found within the limits of the claim of such character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. The prudent man principle was established in Castle v. Womble, 19 L.D. 455, 457 (1894), affirmed in Chrisman v. Miller, 197 U.S. 313 (1905) and recently by the United States Supreme Court in Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963).

Upon careful review of the entire record we find that the gold values in the deposit on the claim are insignificant and insufficient to warrant development work. A prudent man may be justified in doing further exploratory work in the hope of finding a discovery. However, a valid discovery under the mining law requires more than a finding of mineral indications which would not warrant development work but only further exploratory work to determine if a valuable mineral deposit exists in a claim. United States v. George C. Johnson and Robert A. Johnson, A-30606 (October 25, 1966); United States v. Henault Mining Company, 73 I.D. 184 (1966); and United States v. O. Kenneth Smith, A-30626 (December 15, 1966).

---

[1] The test well which was drilled on the claim.

The sand and gravel deposit on the claim may have some qualities which are superior to the other sand and gravel deposits in the vicinity of the claim. The Department has consistently held that sand and gravel suitable for road base, asphalt mix and concrete aggregate without expensive processing but which are used only for the same purposes as other widely available, but less desirable, deposits of sand and gravel, are common varieties of sand and gravel and not locatable under the mining laws since the act of July 23, 1955, 30 U.S.C. § 611 et seq. (1964 ed.), as these facts do not give them a special, distinct value. See United States v. Loyd Ramstad and Edith Ramstad, A-30351 (September 24, 1965) and United States v. R. R. Henseler, Sr. et al., A-29973 (May 14, 1964).

On page 6 of his decision, the Hearing Examiner made the following partial quotation from the existing Departmental regulation defining "common varieties" (43 CFR 3511.1(b), formerly 43 CFR 185.121(b)):

> . . . although they may have value for use in a trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. Mineral materials which occur commonly shall not be deemed to be "common varieties" if a particular deposit has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation.

This subsection had been amended by Acting Secretary of the Interior John A. Carver on September 7, 1962, which amendment also contains the following additional statements:

> In the determination of commercial value, such factors may be considered as quality and quantity of the deposit, geographical location, proximity to market or point of utilization, accessibility to transportation, requirements for reasonable reserves consistent with usual industry practices to serve existing or proposed manufacturing, industrial, or processing facilities, and feasible methods for mining and removal of the material. Limestone suitable for use in the production of cement, metallurgical or chemical grade limestone, gypsum, and the like are not "common varieties." . . . (Underscoring added).

The appellant calls attention to the Hearing Examiner's omission of the latter part of the regulation without explanation, contending that the deposit on the claim meets the factors of quality, quantity, geographical location, proximity to market or point of utilization, proximity to transportation, reserve requirements, serving existing facilities, and feasible method of operation, and, therefore, it is clear that the claim is valid. Be that as it may, these factors, according to the regulation, *may be considered* in the determination of commercial value, and commercial value is only one of the factors to be considered. In addition the material must have distinct and special properties for use in a manufacturing, industrial or processing operation. We feel that the mere mining and removal of sand and gravel for use only on nearby construction projects, such as highways, dams and tunnels does not qualify. The Departmental decisions of September 24, 1965 in *United States v. Loyd Ramstad and Edith Ramstad*, *supra*, and May 14, 1964 in *United States v. R. R. Hensler, Sr. et al.*, *supra*, were rendered after the regulation was amended. If sand and gravel for road base, asphalt mix and congregate aggregate on nearby construction projects can be considered as an uncommon variety, then the action of Congress in amending the Materials Disposal Act by section 1 of the act of July 23, 1955 (30 U.S.C. § 601) to include the disposal of common varieties of mineral materials by sale or free-use permits would be practically nugatory and ineffectual.

Appellant further contends that the Hearing Examiner failed to apply the principles laid down by the United States Court of Appeals for the Ninth Circuit in the case of *Alfred Coleman et al. v. United States*, No. 20,227 (June 21, 1966), but instead followed Departmental decisions which have been overruled by the *Coleman* case. The appellant did not, however, point out any reasons wherein it believes that the instant case conflicts with the Court's decision in *Coleman*. We do not believe that the Examiner's decision conflicts with the *Coleman* decision, which was concerned with building stone on claims located before July 23, 1955, whereas the claim in the instant case was located in 1963. Appellant did quote the following statement from the *Coleman* decision, "proof of discovery must be offered as of the time of the contest proceeding. . . ." The issue of discovery is being determined as of the time of the hearing in the case now before us.

Appellant, relying on the testimony of Dr. Mitchell Light as to the existence of fine gold ore in association with the sand and gravel such as to justify exploration and further development by a prudent man, contends that the Examiner refused to consider the economics of claim development involving the removal by sale of processed sand and gravel in a gold placer mining operation; that the Examiner was advised without contradiction that the gold existent on the claim could be mined profitably if the huge quantities of sand and gravel could be removed from the claim site after processing rather than being stored on the claim, which would obstruct the gold recovery operations of the yet unprocessed deposits; that the appellant has provided in its sand and gravel contract with the Littlerock Aggregate Company for recovery of the placer gold by an attachment with the sand and gravel equipment; and that sand and gravel when found in association with gold ore is not a common variety. The sampling done by both Dr. Light and the contestant's mining engineer is indicative of the fact that a prudent man would not be justified in the further expenditure of time and effort in the expectation of developing a paying gold mine. The evidence developed in this case (including

Dr. Light's testimony, statements in his report Exhibit M, which are quoted herein, supra, affirmative allegations in the appellant's answer to the complaint, supra, and contentions made by appellant in its appeal brief) is both implicit and explicit that there are merely traces of gold in the deposit, and that the appellant is really relying on the marketability of the sand and gravel, and the possibility of extracting the gold as a by-product in conjunction with the mining, removal and processing of the sand and gravel for use on nearby construction projects. Thus, the extraction of the gold would be dependent on the mining of the sand and gravel for sale. In United States v. L. N. Basich, A-30017 (September 23, 1965), the Department said that "The legislative history of the act of July 23, 1955 affords no comfort for the appellant to sustain him in the contention that the finding of meagre values of gold and silver which are insufficient to constitute an independent discovery of these minerals is sufficient to take the sand and gravel on the claims out of the category of common varieties.. . .," holding that a mining claim is properly held invalid because the sand and gravel for which it was located are common varieties not subject to location even though such action prevents disposal of small quantities of gold and silver found with the sand and gravel. (Underscoring added).

The appellant further states that the marketability test has been acceptable in the past and is still the best evidence. There is no question of marketability here. The Examiner held the sand and gravel to be a common variety. In the Basich case, supra, the Department held (syllabus): "Sand and gravel which may be superior to other deposits of sand and gravel because of hardness, soundness, stability, favorable gradation, nonreactivity and nonhydrophilic qualities, and which can be processed and marketed more advantageously but which are suitable and have been used only for the same purposes as other deposits of sand and gravel in the vicinity are common varieties of minerals and not locatable under the mining laws because the special characteristics shown do not give the materials a special, distinct value."

The Hearing Examiner's decision of August 24, 1966 is, therefore, found to be correct and it is hereby affirmed.

Mt. Pinos Development Corporation is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken, the adverse party to be served is:

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Enclosures

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OPD
Gower Federal Service
Appeals List No. 1
PLS

appeal to Sec.
affirmed in part
Lot 39 Rev. & Remanded
A-30828 - 1-29-68

DOCKET FILES

Hearings Procedures: Generally 1850

Where an answer to a contest complaint is not filed within the period set forth in the complaint, the contest proceeding is properly closed by the Manager without a hearing.

United States v. Robert N. Johnson, et al., Contest 06706 (Riverside) (May 5, 1967)

Previous decision set aside
Supp. 4-8-69

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 MAY 26 PM 2 38

In reply refer to:
704
Contest 06706 (Riverside)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

May 5, 1967

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America,
Contestant

v.

Robert N. Johnson
Gary Johnson
Thelma A. Johnson
Walter Johnson
Emma Johnson
Ronald R. Johnson
Janet R. Johnson
Nolan F. Fultz,
Contestees

Involving Royal Black placer mining claim, situated within section 32, T. 4 S., R. 4 W., S.B.M., California.

Decision Affirmed

Mr. John B. Lonergan, as attorney and agent for the above-named contestees, and Mrs. Thelma A. Johnson, as executrix named in the last will of Nolan F. Fultz, deceased, have appealed from the decision of our Riverside district and land office dated March 18, 1966, which declared the Royal Black placer mining claim null and void because of the failure of the contestees to file timely an answer to the charges in the contest complaint. The decision held that the allegations were taken as admitted, in accordance with the notice contained in the contest complaint, and, accordingly, the district and land office rejected the mineral patent application for the mining claim and declared the mining claim null and void.

The record shows that each of the eight mining claimants signed the mineral patent application for the Royal Black mining claim on August 26 and 31, 1964, noting therein that "the post office and mailing address of applicants for the purposes of these proceedings is and will be in care of Lonergan & Jordan, Attorneys at Law, 506 Andreson Building, San Bernardino, California." On February 8, 1966, the contest complaint, issued in accordance with 43 CFR Part 1852, was served on the named contestees (mineral patent applicants), c/o John B. Lonergan, Attorney at Law, 506 Andreson Building, San Bernardino, California. The complaint also gave notice that unless contestees file an answer to the complaint in the Riverside district and land office within 30 days after service of the notice and complaint, the allegations of the complaint will be taken as admitted and the case will be decided without a hearing. (43 CFR 1852.1-7(a)). No answer to the complaint having been filed in the district and land office on or before the close of business on March 10, 1966, the district and land office rendered the decision from which this appeal has been taken.

The record further shows that on March 25, 1966, there was filed in the district and land office an answer to the complaint, executed by contestees Robert N. Johnson, Gary Johnson, Thelma A. Johnson, Walter Johnson, Emma Johnson, Ronald R. Johnson and Janet R. Johnson, and also by John B. Lonergan of Lonergan, Jordan & Gresham, as "Attorneys for Contestees." Mr. Lonergan also signed the answer for the Estate of Nolan F. Fultz, deceased, and he requested a pre-hearing conference on behalf of the contestees. The answer recited that the address of the contestees for purposes of the proceeding "is correctly stated in the Contest Complaint."

The district and land office returned the answer to the contestees at their address of record, advising them that it was filed too late.

It is alleged on appeal, in substance, that Nolan F. Fultz died in 1965, before the contest complaint was filed, and that the successors to his interest in the mining claim were not served, there being no address of record for such parties (the estate or the heirs) in the district and land office. Further, the attorney for the contestees stated that he signed the answer to the contest complaint for the Estate of Nolan F. Fultz, deceased, in the belief that it would "suffice", however, that his attorney-client relationship with Fultz terminated with the death of Mr. Fultz, and that he was not authorized to represent the estate of the decedent. The date of the demise of Mr. Fultz was not given.

The mineral patent application constitutes a part of the record of the contest proceeding. United States v. E. V. Pressentin, et al., Contest No. 4330 (Washington) (December 27, 1960).

The Department's regulations relating to service of contest complaints provide in pertinent part:

> The complaint must be served upon every contestee. If the contestee is of record in the land office, service may be made and proved as provided in 1850.0-6(e). 43 CFR 1852.1-5.
>
> In all cases where a party is represented by an attorney, such attorney will be recognized as fully controlling the same on behalf of his client, and service of any document relating to the proceeding upon such attorney will be deemed to be service on the party he represents. 43 CFR 1850.0-6(e)(4).

The Department has long held that notice of an adverse decision, or any other notice, which is mailed to an address of record is constructively served on the party involved. See Betty Ketchum, 67 I.D. 40 (1960); United States v. Alma Pritchett, A-30456 (November 29, 1965).

It was incumbent upon the heirs or representatives of the Estate of Nolan F. Fultz, deceased, to notify the district and land office of the death of Mr. Fultz, and to furnish a different record address for future communications concerning his interest in the mineral patent application if John B. Lonergan, Attorney at Law, was not to be continued as the attorney or agent for the interest of the estate in the subject application. The heirs or Representatives, by their failure to furnish timely notice to the land office, or a change of designation of the person authorized to receive notices regarding the interest of Fultz in the patent application, must be considered to have had constructive notice of the complaint when it was served on the attorney of record for all the mineral patent applicants.

Looking now at the action taken by the district and land office to terminate the contest proceeding and to reject the mineral patent application, we observe that the Department's regulations pertaining to contest proceedings state in 43 CFR 1852.1-6 that "Within 30 days after service of the complaint * * * · the contestee must file in the office where the contest is pending an answer specifically meeting and responding to the allegations of the complaint * * *" and, in 43 CFR 1852.1-7(a), that "If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the Manager will decide the case without a hearing." (Underscoring added).

The requirements of the cited regulations are mandatory. In United States v. J. Hubert Smith, 67 I.D. 311 (1960), the Department held (syllabus):

> Under the Department's rules governing Government contests against mining claims, where an answer to a complaint is filed late the allegations of the complaint will be taken as admitted by the contestee and the case decided without a hearing by the manager, and the Secretary is without authority to waive the rules to permit the late filing of the answer.

See also United States v. Ruben J. Garcia, et al., A-28889 (July 30, 1962), and United States v. Henry Gilligan, et al., A-28857 (February 19, 1962).

The charges were properly taken as admitted for failure to answer timely the notice of charges in the contest proceeding.

The decision appealed from is affirmed.

The contestees, appellants herein, are allowed the further right of appeal herefrom to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
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Thelma A. Johnson, Executrix for Estate of Nolan F. Fultz, deceased (Certified mail)

Div L&M S&T (4)
Div L&M PM (2)
OPD
Gower Federal Service
Appeals List No. 1
DEH

DOCKET FILES

Multiple Mineral Development: Act of July 23, 1955: Verified Statement
3512.9

In a proceeding on a verified statement under section 5(c) of the act of July 23, 1955 to determine the rights of a mining claimant to the surface resources of his claim, it must be shown that there has been a valid discovery within the meaning of the mining laws made within the limits of his claim to prevent its being subject to the terms and limitations of section 4 of that act.

Mining Claim: Discovery 3413

The discovery required by the mining laws means more than a showing only of isolated bits of mineral not connected with or leading to substantial values.

The mere willingness of a mining claimant to expend further time and money in exploration is insufficient to establish the presence of a discovery on a mining claim.

It is only when the exploratory work on a mining claim shows that minerals exist in such quantities and in such values that there is a reasonable prospect of success in developing a paying mine that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made.

United States v. George Clyde Davis et al., Sacramento 065700-D
(May 5, 1967)

In reply refer to:
704
Sacramento 065700-D

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Mnaagement
Washington, D. C. 20240

May 5, 1967

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America, : Involving the Middleton & Davis
Contestant : placer mining claim located in
v. : Sec. 29, T. 23 N., R. 12 E.,
: M.D.M., recorded in Book 19,
George Clyde Davis, Susie Davis, : Page 76, Official Records of
Roland B. Davis, and James Davis, : Plumas County, California.
Contestees :
:

Decision Affirmed

Mr. George C. Davis, joined by Mr. Waldemar I. Konkoff, a mining engineer and represented as the owner of a 25% interest in the Middleton & Davis placer mining claim, have appealed from a Hearing Examiner's decision, dated September 8, 1966, which held that a discovery of a valuable mineral deposit within the purview of the mining laws has not been made on the said Middleton & Davis placer mining claim and that the claim is, therefore, subject to the restrictions and reservations contained in section 4 of the act of July 23, 1955 (69 Stat. 367; 30 U.S.C. §§ 611-615 (1964)).

The Examiner's decision was rendered as a result of a hearing held on July 19, 1966 pursuant to a verified statement filed by George Clyde Davis claiming surface rights to the lands in the claim contrary to or in conflict with the restrictions and reservations specified in section 4 of the act of July 23, 1955, supra. A surface rights determination proceeding was initiated on behalf of the Forest Service, United States Department of Agriculture, pursuant to section 5(c) of the said act.

The appellants state that they "disagree with this decision on basis of the field engineering and geological data furnished by the owner during the entire 'case history' of the placer mine since 1937 and to June 1966." The only pertinent engineering and geological data furnished by them is that furnished by testimony and documentary evidence at the hearing. Therefore, we have reviewed the entire case record on the merits.

We find that the relevant evidence adduced at the hearing was briefly and correctly summarized by the Hearing Examiner in his decision.

In a proceeding under section 5(c) of the Act of July 23, 1955, supra, to determine the rights of a mining claimant to the surface resources of his claim, it must be shown that there has been a valid discovery within the meaning of the mining laws made within the limits of his claim to prevent its being subject to the terms and limitations of section 4 of that act. United States v. Clarence E. Payne, 68 I.D. 250 (1961). This the claimants have failed to do.

The requirements for a discovery of valuable minerals are set forth in the so-called "prudent man" test enunciated in Castle v. Womble, 19 L.D. 455 (1894), approved by the Supreme Court in Chrisman v. Miller, 197 U.S. 313 (1905), and reaffirmed by the Supreme Court in Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963).

The burden of proof as to a discovery is first upon the Government to establish a prima facie case as to non-discovery and the burden then shifts to the contestee to establish the validity of his claim by a preponderance of the evidence. Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959).

Where a mining claim is located in a national forest, the mining claimant is required to show the mineral values claimed by clear and unequivocal evidence. United States v. John L. Cooper, et al., A-30267 (May 11, 1965).

We concur with the conclusion of the Hearing Examiner that there has not been a discovery of a valuable mineral on the claim such as to satisfy the prudent man test in Castle v. Womble, supra. The Government established a prima facie case and the mining claimant failed to prove that there is a discovery on the claim by a preponderance of the evidence, as is required by Foster v. Seaton, supra.

Appellants have not shown that the claim has a present or prospective value for mining purposes. Some mineral values have been uncovered as reflected by the assay reports introduced in evidence but the discovery required by the mining laws means more than a showing only of isolated bits of mineral not connected with or leading to substantial values. United States v. John L. Cooper et al., supra. Mr. Davis stated that if he had $5 a yard material he could make a living out of the claim, which is an implied admission that he has not as yet made a discovery.

The actual tenor of the evidence is that the claim is a good prospect and that a prudent man may be justified in spending more time and money on it in exploratory work in the hope of developing a paying mine. However, the mere willingness of a mining claimant to expend further time and money in exploration is insuffieient to establish the presence of a discovery on a mining claim. United States v. Robert Hight et al., A-30256 (April 21, 1965).

The Department has held that there is a distinct difference between exploration and discovery under the mining laws. Exploration work is that which is done prior to a discovery in an effort to determine whether the land contains valuable minerals. It is only when the exploratory work shows that minerals exist in such quantities and in such values that there is a reasonable prospect of success in developing a paying mine that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made. United States v. John L. Cooper et al., supra; United States v. Clyde R. Altman and Charles M. Russell, 68 I.D. 235 (1961).

Accordingly, the Hearing Examiner's decision of September 8, 1966 is correct and it is hereby affirmed.

This decision does not extinguish the mining claim. The appellants are at liberty to carry on their prospecting and exploration program on the claim so long as they do not interfere with the rights of the United States to manage the surface resources and to dispose of the vegetative resources as defined in section 4 of the act of July 23, 1955, supra.

Messrs. George C. Davis and Waldemar I. Konkoff are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken, the adverse party to be served is:

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Frances A. Patton
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Forest Service, USDA, Div. of Watershed Management, Wash. D.C. 20250 (12)
Div. of L&M S&T (4)
Div. of L&M PM (2)
Admt. Asst., Hearings
Appeals List No. 1
Gower Federal Service
OPD
PLS

appeal to Sec
affirmed as modified
A-31006 6-10-69

Hearings Procedures: Private Contests 1852.1

The complaint in a private contest proceeding is properly dismissed where the elements of a private contest do not exist. The elements of a private contest do not exist in a situation where the proceeding is initiated by private individuals against the unpatented mining claims of a private corporation, the contestants claiming to be the owners of mining claims in partial conflict with those of the contestee, and not claiming title to or any interest in the lands other than as owners of mining claims. A mining claim is not such an interest in public lands as would qualify the owner of the claim to initiate a private contest under 43 CFR 1852.1-1.

J. Bryant Kasey and Mary Ann Kasey v. Molybdenum Corporation of America, Contest R 948 (May 6, 1968)

5-6-68

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 MAY 17 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In reply refer to:
704
R 948

May 6, 1968

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

J. Bryant Kasey and :
Mary Ann Kasey, :
Contestants :
:
v. :
:
Molybdenum Corporation of :
America, :
Contestee :
:

Private contest involving
unpatented mining claims

Decision Affirmed

J. Bryant Kasey and Mary Ann Kasey have appealed from a Riverside, California, land office decision, dated November 16, 1967, which dismissed their complaint in a private contest against numerous mining claims of the Molybdenum Corporation of America.

The contest complaint filed by J. Bryant Kasey and Mary Ann Kasey purports to be made adversely to any application made or to be made by the Molybdenum Corporation of America for patent of numerous unpatented mining claims located within four sections of land. Although no application for a mineral patent has been filed by the Molybdenum Corporation of America, the Kaseys asserted that they had some knowledge of intent by the corporation to file such an application. The contestants asserted that they have some mining claims in conflict with some of the contestee's claims, and they requested that they be allowed to prove their allegations, that the claims of the contestee be declared null and void, and that the validity of the contestants' claims be affirmed.

Molybdenum Corporation of America filed a Motion for Summary Dismissal of the complaint, giving several reasons of substantive and procedural nature.

The complaint purports to list fifteen facts constituting the grounds for contest. However, the fifteen purported grounds are, in fact, merely conclusions in general terms, and give no facts which could properly be answered. These fifteen conclusions involve questions of the right of possession of the lands involved, and compliance by the contestee with the mining laws of the United States. Furthermore, neither the claims of the contestant nor the claims of the contestee are specifically described and identified, except by names and that they are located within four specified sections of the public land surveys.

In reply refer to:
[illegible]

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D.C. 20240

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

J. Bryant Kasey and
Mary Ann Kasey,
Contestants
v.
Molybdenum Corporation of
America,
Contestee

Private contest involving
unpatented mining claims

Decision Affirmed

J. Bryant Kasey and Mary Ann Kasey have appealed from a Riverside, California, land office decision, dated November 16, 1967, which dismissed their complaint in a private contest against numerous mining claims of the Molybdenum Corporation of America.

The contest complaint filed by J. Bryant Kasey and Mary Ann Kasey purports to be made adversely to any application made or to be made by the Molybdenum Corporation of America for patent of numerous unpatented mining claims located within four sections of land. Although no application for mineral patent has been filed by the Molybdenum Corporation of America, the Kaseys asserted [illegible] that they be allowed to prove their allegations, that the claims of the contestee be declared null and void, and that the validity of the contestants' claims be confirmed.

Molybdenum Corporation of America filed a Motion for Summary Dismissal of the complaint, giving several reasons of substantive and procedural nature. The complaint purported to list fifteen facts constituting the grounds for contest. However, the fifteen purported grounds are, in fact, merely conclusions in general terms, and give no facts which could properly be assessed. These fifteen conclusions involve questions of the right to possession of the land involved, and compliance by the contestee with the mining laws of the United States. Furthermore, neither the claims of the contestants nor the claims of the contestee are specifically described and identified, except by names and that they are located within four sections of the public land surveys.

The land office held that the elements of a contest do not exist, and that the Department of the Interior lacks jurisdiction to adjudicate any question of right of possession as to any claims of the parties to this proceeding. The land office stated that the mining laws, as codified in Title 30 of the United States Code, do not provide for a determination by the Department of the possessory rights of rival mining claimants, but that sections 30 and 29 of Title 30, United States Code, provide for a judicial determination by the courts of a controversy between persons contesting the possession of mineral lands; and that neither party can take advantage of the paramount title of the United States either to sustain his own title or to defeat that of his adversary, citing *Meydenbauer* v. *Stevens*, 78 F. 787 (1897). The land office also held that, even if the elements of a contest were otherwise present, the complaint is subject to summary dismissal for failure to comply with certain provisions of the regulations pertaining to contest proceedings.

The land office decision also stated that the matters alleged in the complaint with respect to the contestee's compliance with the mining laws, including discovery of mineral on the claims, are matters for determination at such time as an application for mineral patent is filed, at which time a protest may properly be filed, and adverse claims may be filed during the prescribed period of such proceedings, but until an application for patent is filed, no determination as to the validity of a mining claim is made by the Department except in cases where the lands are needed for some public purpose or title to the lands is proposed to be conveyed under the nonmineral land disposal laws. The decision also held that there is no basis for a private contest to be initiated by one rival mining claimant against another under the Department's contest regulations in 43 CFR Subpart 1852.

The land office decision is correct. Notwithstanding the defects in the complaint resulting from noncompliance with the regulations pertaining to contest proceedings (43 CFR Subpart 1852), the fact remains that the elements of a private contest do not exist in this situation. The appellants do not claim title to or such an interest in the land as would qualify them to initiate a private contest proceeding to have the mining claims of the defendant corporation invalidated (43 CFR 1852.1-1). As explained in the land office decision, the determination of possessory rights of rival or adverse mining claimants to the same mineral land is committed to the courts by statute, and this Department does not have jurisdiction in such cases.

Further, this controversy has apparently already been adjudicated in the courts. In its motion for summary dismissal of the complaint, the contestee corporation asserted that in 1951 J. Bryant Kasey and Mary Ann Kasey granted and conveyed to Molybdenum Corporation of America all of their claims and interests, including any claims and interests they should thereafter acquire, in the Clark Mountain Mining District, including Sections 11, 12, 13 and 14, T. 16 N., R. 13 E., S.B.M., referred to in contestant's complaint; that in 1959 Mr. and Mrs. Kasey brought an action in the United States District Court for the Southern District of California seeking, among other things,

to recover the mining claims conveyed to Molybdenum Corporation of America; that on March 13, 1963, the District Court entered a judgment denying recovery of the claims and finding that Molybdenum Corporation of America was the sole owner thereof; and that this determination was affirmed by the United States Court of Appeals for the Ninth Circuit. Kasey v. Molybdenum Corporation of America, 336 F. 2d 560 (1964).

The only pertinent reason advanced by the appellants in their appeal is that the land department has jurisdiction to inquire and determine in the public interest any matter affecting a mining location without awaiting the filing of an application for patent, and if the charge of invalidity is established to declare the claim null and void, as held in The Federal Shale Oil Company, 53 I.D. 213 (1930), and that it is quite apparent that the land office is obligated to inquire into the legal status of the claims listed in the complaint. It is true that this Department has jurisdiction, in the public interest, to inquire into the validity of unpatented mining locations without awaiting the filing of an application for patent. If this Department were to find it necessary or advisable in the public interest to inquire into the validity of these mining claims, it would not be done through the vehicle of a private contest proceeding initiated by a private contestant. The initial step in such an inquiry would be a mineral examination of the claims by a qualified mineral examiner. If, as a result of the mineral examination and report, any or all of the claims were believed to be invalid, a Government contest proceeding would be initiated against those claims.

The land office decision of November 16, 1967, is correct, and it hereby affirmed.

J. Bryant Kasey and Mary Ann Kasey are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

If an appeal is taken, the adverse party to be served is the Molybdenum Corporation of America through its attorneys:

Schultheis, Laybourne & Dowds
Attorneys at Law
621 South Spring Street
Los Angeles, California 90014

Frances A. Patton
Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION

Mr. J. Bryant Kasey (Certified Mail)
Mrs. Mary Ann Kasey (Certified Mail)
Schultheis, Laybourne & Dowds
Molybdenum Corporation of America c/o Schultheis, Laybourne & Dowds
Div. of L&M S&T (4)
Div. of L&M PM (2)
Adm. Asst, Hearings
Appeals List No. 1
OPD
Gower Federal Service
PLS

appeal to Sec.

min

Affirmed A-30825
11-3-67

DOCKET FILES

Hearings Procedures: Generally 1850

Where an answer to a contest complaint is not filed within the period set forth in the complaint, the contest proceeding is properly closed by the Manager without a hearing.

United States v. Owen O. Roberts, Contest 080149-C-2 (Sacramento)
(May 11, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 MAY 18 AM 10 00

In reply refer to:
704
Contest 080149-C-2
(Sacramento)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

May 11, 1967

CERTIFIED MAIL
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DECISION

United States of America, : Involving Owensville #2
Contestant : lode mining claim, situated
v. : in section 15, T. 25 N., R. 16 E.,
Owen O. Roberts : M.D.M., Lassen County, California.
Contestee :
:

Decision Affirmed

Owen O. Roberts has appealed from a decision of our Sacramento land office dated July 12, 1966, which declared his Owensville #2 lode mining claim null and void for the reason that no answer by the contestee had been filed to the complaint by the contestant that a valid discovery of a valuable mineral deposit had not been made within the boundaries of the mining claim.

In his appeal, Mr. Roberts states that the claim was originally located for uranium and other minerals, but as the uranium was not of commercial grade, the claim was developed for "decomposed granite," and the location notice was amended to show a placer mining claim instead of a lode mining claim. 1/

The record shows that the contest was initiated by the Bureau of Land Management on the charges that no valid discovery of a valuable mineral deposit is disclosed within the boundaries of the Owensville #2 lode mining claim and that the land embraced within the claim is nonmineral in character. The land office manager issued a complaint, which was served on the contestee on February 1, 1966. The contestee did not answer timely or at all, so the land office rendered its decision of July 12, 1966, which is the subject of the present appeal.

The action of the land office was consonant with the Departmental regulations pertaining to contest proceedings, which provide that "Within 30 days after service of the complaint . . . the contestee must file in the office where the contest is pending an answer specifically meeting and responding to the allegations of the complaint . . . ." (43 CFR 1852.1-6), and that "If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the Manager will decide the case without a hearing." (43 CFR 1852.1-7(a)). (Underscoring supplied).

1/ This action, if it has been done, has no bearing on the present proceeding, which is directed against the Owensville #2 lode mining claim. Any rights which Roberts may have under a new placer mining claim would date only from the time such location was perfected under the mining laws of the United States.

The requirements of the cited regulations are mandatory. In United States v. J. Hubert Smith, 67 I.D. 311 (1960), the Department held (syllabus):

> Under the Department's rules governing Government contests against mining claims, where an answer to a complaint is filed late the allegations of the complaint will be taken as admitted by the contestee and the case decided without a hearing by the manager, and the Secretary is without authority to waive the rules to permit the late filing of the answer.

The charges were properly taken as admitted for failure of the contestee to answer the notice of charges in this contest proceeding.

The decision appealed from is affirmed.

Owen O. Roberts is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein this decision appealed from is in error.

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
Owen O. Roberts (Certified Mail)
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Gower Federal Service
Appeals List No. 1
DEH

appeal to Sec
affirmed A-30835 2-23-68

DOCKET FILES

Mining Claims: Discovery 3413

Although a few samples cut from veins in isolated areas may have spotty values of gold and silver which would warrant mining if there were large enough deposits of such material, no discovery is evidenced by such samples where all of the evidence shows that the mineralization of the veins is erratic and spotty and the high values are not representative of the vein material but are merely isolated bits of mineral not connected with or leading to substantial values.

Testimony by the Government mineral examiner, unrefuted by any credible evidence, showing that there are no veins or lodes exposed on a contested quartz claim is sufficient evidence to support a finding that the claim is invalid for lack of a valid discovery.

Mining Claims: Millsites 3417

The validity of a millsite that is used in connection with mining operations on a vein or lode is necessarily dependent upon the validity of the lode claim to which it is appurtenant.

United States of America v. Frank Coston, Los Angeles Contest No. 0170969-C-36 (Riverside) (May 11, 1967)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 JUN 5 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In Reply Refer to:
704
Los Angeles Contest No.
0170969-C-36 (Riverside)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1967 JUN 5 AM 10 00

May 11, 1967

CERTIFIED MAIL
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DECISION

United States of America, Contestant, v. Frank Coston, Contestee-Appellant.	:	Colorado No.1 and Colorado Proper Mining Claims and Colorado Proper Millsite located in sec. 36, T. 25 S., R. 44 E., and sec. 1, T. 26 S., R. 44 E., M.D.M. (unsurveyed), California.

Decision Affirmed

Mr. Frank Coston has appealed from the Hearing Examiner's decision dated November 2, 1965, determining the above-identified mining claims to be null and void for lack of a valid discovery and determining the above-identified millsite to be invalid for the reason that it was not used in connection with a valid mining claim.

At the beginning of the hearing it was established that both mining claims were located as quartz claims on January 25, 1931 (Exhs. 1, 4), and that by mesne conveyances Mr. Coston acquired them on June 14, 1939 (Exhs. 2, 3, 5, 6). Three witnesses testified at the hearing--Mr. Coston personally and his consulting mining engineer for the mining claimant, and a Bureau employed mining engineer on behalf of the contestant.

Mr. Coston testified that the Navy [1] notified him not to go upon the subject lands (Tr. 43), and he has not been on the claims since 1943 except for 20 to 25 visits (Tr. 42). Previous to that time, he testified, he had done assessment work and had some samples he took assayed for gold; however, he did not offer these assay reports in evidence (Tr. 41-42, 47). Mr. Coston testified that he has never done any mining on the claims (Tr. 46), but some previous occupants of the claims had made considerable improvements and "carried up" ore (Tr. 49).

---

[1] The contest pleadings agree that a leasehold estate in the subject lands was acquired by the Department of the Navy under the right of eminent domain in connection with its Mojave "B" gunnery range (see Civil No. 3129-PH, condemnation proceedings for a leasehold estate then pending in the United States District Court for the Southern District of California, Central Division at Los Angeles), and the lands have been held in possession of the Navy since September 2, 1943.

The lands were withdrawn from all appropriation including mining locations and mineral leasing on October 29, 1963, for use as an aerial gunnery range (Los Angeles 0107128).

Colorado No. 1 Mining Claim

The contestee's and the Bureau's respective mining engineers each testified that they had examined the Colorado No. 1 claim; once they examined the claim together (Tr. 11, 53). Both witnesses submitted sketch maps (Exhs. 9, 10, 11, E, F) and testified as to extensive tunneling done upon this claim. The Bureau's mining engineer is of the opinion that the workings were excavated around the 1900's (Tr. 13-16).

The contestee's mining engineer testified that, in his opinion, the vein material on the claim would cost approximately $7.50 per ton to mine and mill if the veins can support a 100-ton-a-day operation (Tr. 61); he testified that no attempt should be made to mine material with less than $7.50 per ton values (Tr. 73). The Bureau's mining engineer estimated that at the present time it would cost approximately $18 to $25 per ton initially to mine and mill the vein material, depending on the purchase price of the necessary 25-ton-a-day mill he estimated is the minimum size mill for such an operation (Tr. 40). The latter witness testified that prior to World War II some prospectors did explore by mining at a loss at the current wages of that time such material worth $7 a ton in the hope of thereby exposing substantial vein material worth $15 to $20 per ton, but he is of the opinion that such material worth less than $7 per ton would not have warranted even such exploration (Tr. 26-27).

The contestee's mining engineer submitted copies of two of his company's reports (Exhs. A, D) certifying that of 77 samples he cut from the Colorado No. 1 claim or removed from a dump on the claim, 53 samples assayed from a mere trace of gold to values of $2.80 per ton in gold and that only six of his samples tested gold values exceeding the minimum values of $7.50 per ton he required to warrant mining. These latter samples he reported showed gold values of $7.70, $9.10, $12.60, $16.10, $16.10, and $18.20 per ton, respectively. The silver values shown by these 77 samples merely ranged from a trace to .08 ounce per ton, except for two samples which assayed 1.6 and 2.1 ounces per ton. The contestee's mining engineer, in the presence of the Bureau's mining engineer, recut samples the contestee's expert deemed representative clusters of his samples. The Bureau had the recut samples assayed by the assay company used by the mining claimant (Tr. 20, 68), but these recut samples only assayed values of $2.63 to $3.76 per ton in gold and silver (Exh. 18).

The contestee's mining engineer agreed that his assay reports showed the values on the Colorado No. 1 claim in the exposed veins were very erratic (Tr. 70), as shown for example by tests of samples he cut along a certain 50 feet of vein with the following results: The first sample assayed 70 cents in gold per ton, ten feet farther along assayed $2.80 per ton, the next sample ten feet farther along the vein assayed $18.20 per ton gold, the next sample cut ten feet farther along only assayed $5.60 per ton, and the last sample along the 50 feet of vein assayed a mere $2.80 per ton (Tr. 70). The witness did not open the veins beyond the exposed portions and does not know whether the veins increase in values at depth (Tr. 66). The witness has hope that silver leached away from exposed veins and can be found deeper in an unexposed portion of the vein to enrich the material because of the past silver discovered in the general area (Tr. 57).

The Bureau's mining engineer took 18 additional samples from the Colorado No. 1 claim and had them assayed (Tr. 11, Exhs. 12 to 17 incl.). The highest value for gold in a sample taken by this witness assayed $7.70 per ton (Exh. 14), the highest silver value he obtained was $1.00 per ton (Exh. 17), and the highest total values obtained in any of his samples was $7.96 per ton in gold and silver (Exh. 14). None of these samples is of sufficiently high grade material to support a mining operation in his opinion, and only two of the samples taken by the Bureau's mining engineer showed sufficient values ($7.61 and $7.96 per ton) to satisfy the criteria of $7.50 per ton minimum values set by the contestee's expert witness. The Bureau's witness testified that sampling showed only four spots which even justify drilling a few rounds to find out whether those higher values pinch out or not (Tr. 40-41).

The contestee's mining engineer testified that hundreds of tons of material have in the past been mined from the Colorado No. 1 claim (Tr. 53). The Bureau's mining engineer testified that he saw no proof of a discovery on the claim, but he conceded that at the turn of the century there may have been a mine on the claim (Tr. 25), possibly mining as a means of exploration (Tr. 26). However, the latter witness testified that if there had been minable values on the claim in the past, the ore has been gleaned out long ago (Tr. 15, 26). The Bureau's mining engineer testified that the area is relatively isolated, the topography rough, and the quartz of a low, loose grade which fades out in the face of some of the tunnels (Tr. 25, 26).

Mr. Coston argues in his appeal that the fact that the Department of the Navy had taken possession of the land and prevented further exploration must be considered in determining whether a valid discovery has been shown.

Under the mining laws of the United States, one may take possession of vacant public land open to location and, after filing notice of location, retain that possession against all except the Government while the mining claimant is in diligent prosecution of efforts to discover valuable deposits thereon, but, when the Government withdraws its consent to such location by withdrawing the land from the operation of the mining laws or by the institution of adverse proceedings against a mining claim, the locator must show that he has made a discovery of valuable mineral deposits within the limits of the claim in order to retain his possession. See United States v. Harold Dale, A-30465 (January 20, 1966) and the decision cited therein. It follows that in the event the mining claimant did not have a present discovery on the claim at the time the Government took possession of the land, the claimant had no further right of pedis possessio and, consequently, no further right to explore the land in the hope of exposing a valid discovery thereon. Moreover, if there had formerly been a discovery on the claim which at that time had been mined out, the old mine would not be evidence of a present discovery. The Department has held that it must be shown as a present fact that the claim is valuable for minerals. See United States v. Margherita Logomarcini, 60 I.D. 371, 373 (1949). The United States Supreme Court cited the Logomarcini decision with approval in Best v. Humboldt Placer Mining Company, 371 U. S. 334, 335 (1963), pointing out that although a mining claimant need not apply for a patent to his claim he thereby exposes himself to the chance that at some future time the conditions on his claim will no longer support a discovery. See also Adams v. United States, 318 F. 2d 861 (9th Cir. 1963).

The opinion of the Government's expert witness is that the quality, quantity, and nature of the mineral deposits now exposed on the claim, when compared to the costs of mining and milling, are such that a prudent man would not be justified in spending time and money on the claims with a reasonable expectation of earning a profit. This opinion is based on his showing that, although a very few moderately higher values are to be found, they are small, sporadic and not continuous.

The Government established a prima facie case that no discovery within the meaning of the mining laws presently exists within the limits of the claim. It then became necessary for the appellant to establish by a preponderance of the evidence, not merely evidence of equal weight, that under present circumstances and at the time the Navy assumed possession of the land, a person of ordinary prudence would be justified in expending funds with a reasonable expectation that a profitable mine might be developed if mining activities were permitted on the land. See United States v. R. W. Wingfield, A-30642 (Feburary 17, 1967), which involves a case where successful mining may also have been conducted on the claim in years past; United States v. Julius S. Foster, A-29994 (June 24, 1964).

The appellant agrees that the assay values shown by sampling vary widely, but stresses that a few of the samples showed values which according to his expert witness are of sufficient high grade material to mine profitably.

Certainly the evidence as to values of gold and silver which are less than the cost of feasible methods of recovering the metals is insufficient to establish a discovery. See United States v. Ray Sparks Caldwell, A-30633 (December 15, 1966). Moreover, a few higher mineral values must properly be denied substantial weight when the samples from which these values are obtained are shown to be in areas of high concentration not representative of the claim. See United States v. August Herman, 72 I.D. 307, 312 (1965). A showing of isolated bits of mineral not connected with or leading to substantial values, even when connected with a geological inference, cannot be substituted for the actual exposure of sufficient minerals. United States v. J. S. Devenny, A-30031 (June 19, 1964). The Department held in United States v. Jessie Shackleford, A-28788 (August 15, 1962), that even though the mining claimants offered in evidence samples with values as much as $111.72 per ton of rock sampled, since such samples were not representative of the mineralization in the vein structure exposed on the claims, and the evidence showed low values of gold and silver in the erratic mineralization exposed on the claims except for the few high values, the claims were properly regarded as prospects only.

After a careful review of all of the evidence adduced at the hearing, it is clear that the mineralization exposed on the Colorado No. 1 claim is very erratic and of predominantly low values. Note the low values shown at ten-foot intervals along 50 feet of vein in the area where the contestee reported his best sample with values of $18.20 per ton; the low values obtained when the samples recut by the contestee's mining engineer from clusters he deemed representative were assayed; the much lower values sometimes shown when the Bureau's mining engineer sampled places previously sampled by the contestee's expert--all clear evidence of the spotty mineralization remaining in the exposed veins. The values shown, and the geologic inference relied upon by the appellant's expert, at best, might encourage further exploration in the hope of exposing substantial quantities of minable grade material if such mining activity were still permissible on the claim. However, evidence that might encourage further prospecting is not evidence of a discovery within the mining laws. See United States v. Estate of Carroll D. Murphy, A-29198 (March 12, 1963). Although the values shown need not be such as will demonstrate a profitable mining operation, or that it is more probable than not that a profitable mining operation can be brought about, to sustain a discovery there must be a showing that a profitable venture may reasonably be expected to result. See United States v. J. S. Devenny, supra.

The appellant is correct in his assertion, in substance, that the fact that low values are also found on a claim does not mean that there is no discovery; however, the mining claimant had the burden of proving that there is a sufficient reserve of minable material to show a profitable venture may reasonably be expected. The five or more samples of better grade material mentioned by the appellant, all from areas surrounded immediately by material not worth mining is not the required evidence of adequate minable reserves so that a prudent man could reasonably expect a profit to result from the venture.

The appellant complains that the Bureau's mining engineer had his samples assayed by a different assay company (except for the samples recut by the contestee's witness) than the assayer employed by the mining claimant's expert witness. The appellant asserts that he does not understand the purpose for the Government using a different assayer.

At the hearing the Bureau's witness explained that he had the samples recut by the contestee's mining engineer assayed by the company that had assayed the latter's original samples (Tr. 20), but he was not questioned as to the reason he chose a different assay company to test the samples he personally cut. The contestee made no objection to the introduction of any of the certified assay reports, and did not question the contestant's witness as to his choice of assayers. One of the purposes of a hearing is give the adverse parties an opportunity to cross-examine the other party's witnesses as to offered testimony and other evidence. The appropriate time for the appellant to have demanded an explanation for the witness's choice of assayers was at the hearing when the witness was present and available to be cross-examined under oath as to his actions. We can only speculate at this time that the witness used an assay company with which presumably his past experiences had been satisfactory.

For the reasons stated, the appellant has failed to show that there is a valid discovery within the meaning of the mining laws on the Colorado No. 1 mining claim.

Colorado Proper Mining Claim

The Bureau's mining engineer testified that the Colorado Proper claim is located approximately one-half mile south of the other contested claim (Tr. 12). The witness testified that he had examined the Colorado Proper claim, but found no vein exposed on this claim (Tr. 32). He described the claim as "a good camping spot; spring water there, and that was all" (Tr. 33).

The mining claimant's consulting engineer testified that he was upon the Colorado Proper claim (Tr. 53). The witness merely stated that he saw places on the claim that he wanted to explore where a vein might be developed, but he did not have time. All this witness saw on the claim were a few rocks that he did not have time to examine (Tr. 63).

Mr. Coston testified that some years past he took samples mostly from a dump he found on the Colorado Proper claim (Tr. 43), but instead of offering in evidence certified reports as to the assay results from these samples, he merely stated in general terms that the assays ran $10 to $12 a ton (Tr. 43), and later estimated the samples ran $8 to $10.30 (Tr. 47). He testified that he picked some of the samples up from the ground and he could not testify as to where they came from (Tr. 47). As stated previously, the mining claimant testified that he did no mining on either claim (Tr. 46).

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 JUN 5 [illegible] 11 00

As explained in the Hearing Examiner's decision, the requirements (see Jefferson-Montana Copper Co., 41 L.D. 320 (1912)) necessary to establish a valid discovery on a lode mining claim are:

(1) There must be a vein or lode of quartz or other rock in place;

(2) The quartz or other rock in place must carry gold or some other valuable mineral deposit; and

(3) The two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in an effort to develop a valuable mine.

The appellant argues that the testimony of the Bureau's mining engineer relating to the Colorado Proper mining claim is insufficient to establish a *prima facie* case of a lack of a valid discovery. The testimony that the mineral examiner could find no exposed vein on the claim did establish a *prima facie* showing, since the first requirement of the criteria established by the *Jefferson-Montana Copper Mines Co.* decision, *supra*, is that there must be a vein or lode. In the absence of a showing of a vein or lode on the claim, the other two cited requirements also cannot be satisfied.

The appellant asserts that the general statements of the mining claimant as to samples he picked up from the claim, although not supported by certified assay reports or evidence of proper sampling procedures, constitute evidence which preponderates to establish that there is a discovery on the Colorado Proper claim. The mining claimant could not testify as to where the samples he mentioned came from originally, the true size and values of the samples, or even whether the material is from a lode or vein--such evidence can be given little consideration.

The appellant, in substance, asserts that the testimony of the Bureau's mining engineer as to this claim is conflicting, citing the following testimony:

Direct Examination (Tr. 27-28): Did you find any workings on the Colorado Proper mining claim, . . . ?

Answer: No, it was ostensibly used for a millsite, and there was no workings outside of the mine or excavation there where the old cabin had apparently been years ago.

Cross-examination (Tr. 32): Did you find any veins in the Colorado Proper?

Answer: No, apparently no veins and no workings.

The appellant argues that the witness has offered contradictory testimony, showing that his mineral examination of the Colorado Proper claim was too cursory for his testimony as to that claim to have significance.

Although the answer "there was no workings outside of the mine" by itself could leave uncertainty as to whether the "mine" refers to other than the much discussed old workings on the Colorado No. 1 claim, the witness has not contradicted his testimony that he saw no workings on the Colorado Proper claim when his entire testimony is considered in context; it is unequivocal testimony that he saw no workings on the Colorado Proper claim. Moreover, the mining claimant never asserted that there are workings on the Colorado Proper claim.

The mineral examiner's testimony that he found no vein exposed on the Colorado Proper claim established a prima facie case of no discovery on that lode claim, evidence the mining claimant has not refuted with credible evidence. For the reasons stated, the appellant has failed to show error in the Hearing Examiner's finding that there is no discovery on the Colorado Proper claim.

Colorado Proper Millsite

The parties agreed at the hearing (Tr. 7-8) that the millsite location was not recorded, but that it includes the same land embraced in the Colorado Proper lode mining claim location. Rev. Stat. § 2237 (1875) (30 U.S.C. § 42 (1964)) requires that a millsite include only nonmineral land.

Mr. Coston testified that he acquired the millsite the same year (1939) as the mining claims (Tr. 41). The claimant testified that a mill had been placed upon the Colorado Proper mining claim and then abandoned by its owner in the early 1930's (Tr. 47-48). Mr. Coston admitted that he has never operated the mill (Tr. 46, 49), and the mill has never been used since it was abandoned by its owner, a lessee of a former mining claimant (Tr. 47-48). The witness testified that when the Navy took possession of the land on September 2, 1943, there was on the millsite a bunk house, a mill house, a motor, a ball mill and cyanide tanks, water tanks, a blacksmith shop with bellows and tools, a well and pump, and timbers and pipe (Tr. 43-44, 46). The witness testified that when he was last on the claim he found nothing there except pieces of track for the mine (Tr. 44), and ruins (Tr. 45).

The Bureau's mining engineer testified that when he examined the claim he found a small pile of tailings on the claim indicating that 40 or 50 years ago someone had done a small amount of custom sampling, milling or other such activity on the claim (Tr. 27). He found no improvements on the claim, other than signs that an old cabin had apparently been there years ago (Tr. 28).

The contestee's consulting mining engineer testified that he saw ruins of a partly burnt mill on the claim (Tr. 62).

The appeal comports, in substance, with the Hearing Examiner's decision that the validity of the millsite rests on the validity of one or both of the contested mining claims.

Two classes of millsites may be located: (1) those that are used and occupied by the proprietor of a vein or lode for mining and milling purposes; and (2) those that have thereon quartz mills and reduction works, the ownership of which is disconnected with the lode or vein. 30 U.S.C. § 42 (1964). It is clear that the second clause is not applicable to the case under consideration.

The validity of a millsite that is used in connection with mining operations on a vein or lode is necessarily dependent upon the validity of the lode claim to which it is appurtenant. See United States v. Edgecumbe Exploration Company, Inc. A-29908 (May 25, 1964). Thus, since the mining claims are null and void it follows that the Colorado Proper millsite is invalid.

Accordingly, the decision of the Hearing Examiner finding the contested mining claims and millsite invalid is affirmed.

Mr. Coston is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim or millsite included in the appeal. If the appeal covers both mining claims and the millsite adversely affected by this decision, the total filing fee will be $15. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of showing wherein the decision appealed from is in error.

If an appeal is taken by Mr. Coston, the attorney for the adverse party who must be served is:

Office of the Regional Solicitor
United States Department of the Interior
Room 7759
300 North Los Angeles Street
Los Angeles, California 90012

Newton Frishberg

Chief, Office of Appeals and Hearings

Enclosures (2)

DISTRIBUTION:

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Hearing Examiner Rudolph Steiner (Sacramento)
Administrative Assistant, Appeals and Hearings
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OPD
Gower Federal Service
Appeals List No. 1
JHO'D

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 JUN 5 AM 10 00

DOCKET FILES

Appeals Procedure: Dismissal 1840.0-7

An appeal to the Director will be dismissed summarily when the appellant fails to serve a copy of its notice of appeal and of its statement of reasons for appeal on the adverse party named in the decision appealed from in accordance with regulations pertaining to appeals procedures.

An appeal to the Director will be summarily dismissed when the appellant fails to submit its statement of reasons for the appeal within the time allowed and there is no evidence to indicate that the statement was mailed or probably mailed within the time allowed by the regulations.

United States v. Asbestos Development Corporation, Contest No. 076236-C-1, etc. (Sacramento) (May 16, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 MAY 22 AM 10 00

In reply refer to:
704
Contests 076236-C-1
076236-C-2
(Sacramento)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

May 16, 1967

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America,	:	Involving Blue Rock Mine,
Contestant	:	Blue Rock Mine Nos. 2 to 16,
v.	:	inclusive, placer mining claims,
Asbestos Development Corporation,	:	and Water Hole mill site,
Contestee	:	situated in section 35, T. 23 S.,
	:	R. 6 E., and sections 1, 2, 3, 11,
	:	and 12, T. 24 S., R. 6 E., M.D.M.,
	:	Monterey County, California.
	:	

Appeal Dismissed

The contestee has appealed from a Hearing Examiner's decision dated August 9, 1966, which declared its Blue Rock Mine, Blue Rock Mine Nos. 2 to 16, inclusive, placer mining claims null and void for lack of discovery of a valuable mineral deposit, and its Water Hole mill site null and void for lack of use.

Notice of appeal was timely filed September 12, 1966, with payment of the required filing fees. The statement of reasons for the appeal was received in this office October 19, 1966, after expiration of the period allowed by regulation 43 CFR 1840.0-6(b). The record does not show that the statement of reasons was probably mailed within the time allowed.

The Hearing Examiner's decision named the Regional Solicitor, United States Department of the Interior, Box 21-4527, Sacramento, California 95821, as the adverse party to be served with a copy of the notice of appeal and of the statement of reasons for the appeal.

The appellant has not furnished proof of service on the designated adverse party of its notice of appeal nor of its statement of reasons for appeal, within 15 days after filing of the respective documents, as required by 43 CFR 1842.5-2. By letter of May 1, 1967, the appellant was called upon to submit such proof of service. Its response, received May 12, 1967, consisted only of evidence of filing of the original notice of appeal with the Hearing Examiner and copies of the notice of appeal and of the statement of reasons. This is not compliance with the regulation above cited.

The appellant obviously has failed to serve copies of the notice of appeal and of the statement of reasons for the appeal upon the adverse party. Accordingly, its appeal must be summarily dismissed for such failure to comply with the regulation 43 CFR 1842.5-2. It likewise is subject to summary dismissal for failure to submit its statement of reasons within the period allowed by 43 CFR 1840.0-6(b). 43 CFR 1840.0-7; see Lena J. Lotspeich, A-30045 (August 13, 1963), and Sam Mobley and Anel C. Mobley, A-29398 (August 14, 1963).

Asbestos Development Corporation is allowed the right of appeal herefrom to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim or mill site included in the appeal. If the appeal covers all 16 mining claims and the one mill site adversely affected by this decision, the total filing fee will be $85. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error. If an appeal is filed, the adverse party to be served is:

Regional Solicitor
U.S. Department of the Interior
P. O. Box 21-4527
Sacramento, California 95821

Frances A. Patton
Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
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Div. of L&M PM (2)
OPD
Adm. Asst., Hearings
Gower Federal Service
Appeals List No. 1
DEH

appealed to Sec ; 847
dismissed A-30 9-20-67

DOCKET FILE

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1967 MAY 26 PM 2 38

Mining Claims: Mill Sites 3417

> Mill sites are properly declared null and void and the patent application for them is properly rejected where the evidence in a contest hearing shows that the applicant is not actually using the land for mining and milling purposes, and the applicant has not occupied and used the mill sites (by improvements or otherwise) in such a manner as to clearly establish an intended use in good faith of the mill sites distinctly and explicitly for mining and milling purposes in connection with the lode with which each is associated.

United States v. Mammoth Mountain Mining Company, Sacramento Contest No. 074573, Riverside Contest No. 02486 (May 18, 1967)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In Reply Refer to:
704
Sacramento Contest
No. 074573
Riverside Contest
No. 02486

May 18, 1967

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America,
Contestant,

v.

Mammoth Mountain Mining Company,
Contestee-Appellant.

Tom Lane Mill Site, Little Mammoth
Mill Site, and Mammoth Mill Site
located in sec. 25, T. 26 S.,
R. 32 E., and sec. 30, T. 26 S.,
R. 33 E., M.D.M., California.

Decision Affirmed

The Mammoth Mountain Mining Company has appealed from the Hearing Examiner's decision dated January 10, 1966, (1) determining that the above-identified mill sites are null and void for the reason that there is not such use or occupation of the land as would satisfy the requirements of Rev. Stat. § 2337 (1875) (30 U.S.C. § 42 (1964)), and (2) rejecting that part of the appellant's amended application seeking patent to the mill sites.

The amended mineral patent application (Sacramento 074573, Riverside 02486) alleges that commercial quantities of gold have been extracted from, and are to be found on, the Tom Lane, Little Mammoth and Burdette lode mining claims and that the above-named mill sites are intended to be used in conjunction with mining operations on the lode claims to supply water and deny entrance of tailings into the Kern River. The Bureau's land office at Sacramento, California, issued a decision dated November 16, 1964, approving the appellant's application for patent to the three mining claims, but not the three contested mill sites to which the application also sought patent.[1]

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[1] The contest pleadings and testimony (Tr. 42) agree that a portion of the Mammoth mill site embraces land sought by Kern County pursuant to Recreation and Public Purposes application Riverside 02712.

At the hearing before the Hearing Examiner the following pertinent facts were adduced:

The group of mining claims in the area has been credited with approximately $500,000 in total production of gold since 1850 when the lode was discovered, most of the production coming from the Little Mammoth mine (Tr. 13-14). The mining was done in the "early days" and then again approximately from 1908 to 1915, and then lesser production from 1938 to 1941, with no production since 1941 (Tr. 14, 26, 65). A consulting mining engineer and geologist, testifying as the patent applicant's only witness, stated that it is not known where the ore from the mine was milled (Tr. 69, 72). In 1941 Congress temporarily prohibited gold mining, and the witnesses agree that it has not been economically feasible to activate the mine since that time (Tr. 26, 58). The claimant's expert witness testified that commerical deposits remain in the mine (Tr. 57, 65).

The contested mill sites were located on April 7, 1911 [2] (Tr. 58, Exhs. 2A, 2B, 2C), 1.2 to 1.5 miles northeast of the aforementioned patented lode mining claims with which the mill sites are associated (Tr. 12, 48). There are no structures on any of the three subject mill sites (Tr. 9, 36).

The patent applicant's mining engineer testified that he has read company records which show that at one time a mill was placed on the contested Tom Lane mill site, but the mill was moved during the 1930's to the portal of the mine (Tr. 59, 67, 68, 72-73). The witness testified that he has been informed that some milling was done on the Tom Lane mill site, but he saw no tailings on the site evidencing such activity (Tr. 59, 61, 68). Before placing the mill on the Tom Lane mill site, an entry ditch for water to be used in the proposed milling was constructed on the millsites (Tr. 58-59).

The company's consulting mining engineer testified that he has recommended to the company that the mine remain dormant until economic factors improve, but that efforts be made to hold the mill sites in reserve until the mine can be operated again (Tr. 58). He is of the opinion that the location of the mill at the mine portal is undesirable because tailings might enter a nearby river or drift onto private property, and it is more economical to take water from the ditch on the mill sites than pump it to the mine (Tr. 52, 54). However, the witness later testified that the mine shafts caused sufficient water to conduct mining operations (Tr. 72). In the opinion of the patent applicant's expert witness, the topography of the contested mill sites is ideal for milling purposes (Tr. 54).

---

[2] A Government mineral examiner testified that the mill sites were located on April 11, 1961 (Tr. 7), which is the date the location notices were recorded.

The patent applicant's witness testified that the mill sites are not being used in connection with milling or storage because the mine is not in operation (Tr. 66). He stated that to "show good faith" to retain the patent applicant's asserted interest in the mill sites, he had the company bulldoze an area on the mill sites for material for an earth embankment (revetment) to retain future tailings and prevent erosion, clean portions of the ditch on the mill sites and reverse the grade, and rehabilitate 3/4th miles of an old decayed road leading to the Little Mammoth mill site (Tr. 59, 62, 63, 73). The Bureau's mineral examiners each testified that the bulldozing on the mill sites was not in connection with any mining or milling purposes (Tr. 17, 31), and their examinations show that the mill sites are not being used for any mining or milling purposes (Tr. 15, 35).

The appellant argues that the law does not require a showing of actual use of mill sites for mining and milling purposes in order to perfect patent thereto.

Two classes of mill sites may be located: (1) those that are used and occupied by the proprietor of a vein or lode for mining and milling purposes; and (2) those that have thereon quartz mills or reductions works, the ownership of which is disconnected with the lode or vein. Rev. Stat. § 2237, *supra*; *United States* v. *Edgecumbe Exploration Company, Inc.*, A-29908 (May 25, 1964). Clearly, the appellant seeks patent under the first class of mill sites. Such mill sites are simply auxiliary to the working of mineral claims, and to make them valid, if a claimant is not actually using the land for mining and milling purposes, the patent applicant must show such an occupation and use of the land, by improvements or otherwise, as evidences an intended use of the tracts in good faith for mining and milling purposes. See *United States* v. *Charles P. MacKenzie*, A-28659 (November 1, 1961); 43 CFR 3417.1 and 3460.1.

In *United States* v. *Langmade and Mistler*, 52 L.D. 700 (1929), the Department considered a case wherein the lode associated with the claimed mill site was valid, there was a frame shanty on the mill site, a small rock crusher such as is used for sampling ore, 150 feet of pipe leading to a well on adjacent land, and a fence enclosing the mill site. The evidence showed that the shanty had been used to house men to run the crusher and work the lode, and some mining tools had been kept therein. The rock crusher had been used to test between 400 and 500 pounds of ore from the associated lode at different times. The lode contained ore which had been mined during World War I, but not since. The Government mineral examiners conceded that the land could be used as a mill site in connection with the associated lode. A witness testified that he intended to purchase the mining claim and mill site from the patent applicants in the event it was determined that the lands are patentable, and, after he has done sufficient mining, the prospective buyer stated that he planned on placing a mill on the mill site. The Department held, as to the prospective buyer's testimony, that his mere intention or purpose on a certain contingency of performing acts of use or occupation thereon will not satisfy the law. Then, the Department held that meagre use and unsubstantial improvement of a mill site for mining and milling purposes leads to serious doubt as to the intention of the applicants in seeking title to the land, and concluded that the contestees had not sufficiently shown that the mill site was sought for use and occupancy in good faith by the claimants of the lode for mining and milling purposes.

The record compiled at the hearing involving the present contest shows that since location of the contested mill sites in 1911, at best only one of the three mill sites may have been used at any time, and such use, if any, was temporary and uncertain as to its connection with the mining activities on the lode. Considering the many years the lode has been mined, the many years since the mill sites were located, the extensive mining activities successfully conducted on the lode with insignificant, if any, use made of the mill sites, the uncertain showing as to past use of the mill sites merely based upon interpretations of old company records not offered in evidence, and the absence of any structures on the mill sites, the appellant's showing is even less substantial and persuasive than the facts which the Department held too meagre to warrant patenting a mill site in Langmade and Mistler, supra. The plan of the mill site patent applicant to obtain title to the mill site land for possible future use in connection with possible future mining activities is too speculative and contingent to satisfy the requirements of Rev. Stat. § 2337, supra.

For the reasons stated, the decision of the Hearing Examiner, determining that the mill sites are invalid and rejecting the patent application for such lands, is affirmed.

The Mammoth Mountain Mining Company is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mill site included in the appeal. Thus, if the appeal includes all mill sites adversely affected by this decision, the total filing fee will be $15. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed, the appellant will have the burden of showing wherein the decision appealed from is in error.

If an appeal is taken by the Mammoth Mountain Mining Company, the attorney for the adverse party who must be served is:

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United States Department of the Interior
Post Office Box 21-4527
Sacramento, California 95821.

Newton Frishberg
Chief, Office of Appeals and Hearings

Enclosures 2

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Gilmore & Gilmore, Agents for Appellant
Regional Solicitor, United States Department of the Interior, Sacramento, California
Mammoth Mountain Mining Company, Mr. Sam H. Rudnick, President, Bakersfield, California
Mammoth Mountain Mining Company, Bakersfield, California
Hearing Examiner Rudolph M. Steiner (Sacramento)
Administrative Assistant, Appeals and Hearings
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Gower Federal Service
Appeals List No. 1
JHO'D

appealed to Sec.
A-31015 Remanded
12-29-68

Mining Claims: Common Varieties 3511

Where it is not shown that deposits of limestone within the limits of the contested mining claims possess distinct and special properties making them valuable for use over and above the normal uses of the general run of such deposits, they are common varieties not locatable under the mining laws subsequent to July 23, 1955.

Chas. Pfizer & Co., Inc., Contest No. 0154245 (Los Angeles) (May 29, 1968)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 JUN 24 AM 10 00

In reply refer to:
704
Contest No. 0154245
(Los Angeles)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

May 29, 1968

Certified Mail
Return Receipt Requested

DECISION

United States, :
Contestant :
v. :
Chas. Pfizer & Co., Inc., :
Contestee :

Largo Vista Nos. 1, 2, 3, 4, 5 and 6 placer mining claims situated in sec. 19, T. 4 N., R. 8 W., S.B.M., Los Angeles County, California, within the Angeles National Forest

Decision Affirmed

The Chas. Pfizer & Co., Inc., successor to Anchor Minerals and Chemicals, Inc., formerly known as the Victorville Lime Rock Co., has appealed from the decision of the Hearing Examiner, dated March 18, 1964, declaring the Largo Vista Nos. 1, 2, 3, 4, 5 and 6 placer mining claims null and void and rejecting the mineral patent application for them.

The contest complaint initiating adverse proceedings against the mining claims charged that a discovery of a valuable mineral deposit has not been made within the limits of any of the unpatented mining claims listed above and that the land within the claims is nonmineral in character within the meaning of the mining laws. A hearing was held on May 21, 1963.

The mining claims were located in 1957 for limestone. The claims are within the Angeles National Forest and situated in an area of moderately steep relief on the north flank of the San Gabriel Mountains in the Llano Mining District in Los Angeles County, California.

The record made at the hearing and the appeal have been carefully reviewed. The testimony and evidence adduced at the hearing have been amply summarized in the decision of the Hearing Examiner and need not be repeated here in detail.

The Hearing Examiner noted that distinct and special values attributed to this deposit of limestone by the contestee are white color, high combined carbonate content, lack of impurities, ease of mining, closeness to market, and the ability to fit into all purchasing channels of carbonate materials. He stated that limestone deposits for the most part are essentially white

in color, lack other impurities, and fit into purchasing channels for carbonate materials.[1] He stated that to conclude that these qualities are distinct and special values would be tantamount to the conclusion that all limestone is not a common variety of material.[2] The Hearing Examiner also stated that according to the U. S. Bureau of Mines Bulletin 95, limestone is the general name for sedimentary rock composed essentially of calcium carbonate. He then concluded that under this definition it cannot be denied that limestone is a commonly occurring material found in abundance throughout the United States. He found that the geologic map (Exh. 19) of the area of the claims submitted by the professor of geology who testified for the contestant is more comprehensive and convincing than the map (Exh. G) submitted by the consulting engineer, admittedly not a geologist, who testified for the contestee, because the former has detailed cross sections of the outcrops of limestone exposed within each claim. He also noted that these two witnesses disagree as to the specific type of limestone contained in the sporadic beds within the claims.

The Hearing Examiner pointed out that the contestant's samples were obtained in the presence of and from the places indicated by representatives of the contestee and submitted to a recognized, impartial laboratory for analysis. He found evidence of this analysis more probative and of greater weight than the uncorroborated evidence of contestee's analysis. He explained that limestone suitable for use in the production of cement must have the special properties demanded by the manufacturers, and stated that little, if any, of the limestone on the Largo Vista claims qualifies as suitable for use in the production of cement or as a metallurgical or chemical grade limestone. He found that the limestone deposits within the Largo Vista claims do not possess the necessary minimum requirements of the metallurgical-chemical trade as to the percentage of calcium carbonate. He then found that the limestone deposits on the Largo Vista claims do not have the necessary chemical and physical qualities for use in the manufacture of cement. The Hearing Examiner also found that the deposits of limestone within the claims do not possess a distinct, special, or economic value for use over and above the general run of such material. He pointed out that the act of July 23, 1955 (30 U.S.C. sec. 611 (1964)), removed common varieties of materials from location under the mining laws. He determined that the limestone deposits within the limits of the Largo Vista claims do not meet any of the requirements necessary to remove them from the "common variety of materials." The Hearing

---

[1] It would have been more accurate to state that many limestone deposits are essentially white in color, lack other impurities, and fit into purchasing channels for carbonate materials.

[2] This generalization should have been limited to "all similar deposits of limestone" rather than "all limestone".

Examiner concluded that they are of widespread occurrence and are a common variety as defined by the regulation of the Department and are not locatable under the mining law.

The appellant contends that the decision appealed from is in error in holding that the carbonate rock within the claims is a common variety of stone within the meaning of the act of July 23, 1955, supra. It asserts that the Hearing Examiner's decision failed to determine whether the total carbonate content, the color and freedom from impurities of the rock on the claims are properties giving it distinct and special value. It is maintained that the evidence discloses that the high carbonate rock on the claims is limestone as the term is commonly used in industry, is valuable as a source of raw material for a bona fide industry, which requires rock with a high carbonate content, a high white color and a lack of noncarbonate impurities, and that substantial quantities of carbonate rock with these properties can be obtained from each of these claims by selective mining.

Under the mining laws all valuable mineral deposits in the public lands are open to exploration and purchase and the lands in which they are found are open to occupation and purchase except as they may have been withdrawn or reserved for other disposition (30 U.S.C. sec. 22 (1964)). Section 3 of the act of July 23, 1955 (30 U.S.C. sec. 611 (1964)), amended the United States mining laws by removing common varieties of stone, sand, gravel, etc., from the category of valuable mineral deposits. It provides, inter alia, that "common varieties" as used in the act does not include any material which is "valuable because the deposit has some property giving it distinct and special value." Thus, the Department interprets common varieties in regulation 43 CFR 3511.1(b), formerly 43 CFR 185.121(b):

> "Common varieties" includes deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. Mineral materials which occur commonly shall not be deemed to be "common varieties" if a particular deposit has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation. In the determination of commercial value, such factors may be considered as quality and quantity of the deposit, geographical location, proximity to market or point of utilization, accessibility to transportation, requirements for reasonable reserves consistent with usual industry practices to serve existing or proposed manufacturing, industrial, or processing facilities, and feasible methods for mining and removal of the material. Limestone suitable for use in the production of cement, metallurgical or chemical grade limestone, gypsum, and the like are not "common varieties." This subsection does not relieve a claimant from any requirements of the mining laws. (emphasis supplied).

Mr. Piercy, Vice President and General Manager, Anchor Minerals and Chemicals, Inc., formerly known as Victorville Lime Rock Co., predecessors to the contestee herein, testified that the material from its quarry (not the claims involved herein) by selection and separation has been graded according to color. No. 1 is the whitest and is supplied to paint, putty, floor tile and ceramic industries where color is extremely important. No. 2 grade, which is slightly stained, is supplied for use in water paints, stucco, plaster, and roofing granules. No. 3 grade, with discolorations somewhat darker than that of No. 2, is supplied for use in rubber floor tile, oil well uses and the like. The balance is designated as No. 4 and supplied to users where color is of no importance, such as foundry rock, pipe coatings, asphalt fillers and stock feed. (Tr. 282 et seq., 371 et seq., and Exh. B). He testified that the No. 1 grade brought the highest price and profit. (Tr. 300, 418). He explained that in addition to color his company requires a material of high carbonate content. He testified that the raw material from the Largo Vista claims was the same as that produced from the company's own quarry, although not as high in calcium carbonate, and that the overall carbonate content would be identical. He also testified that 2,500 tons of material were removed from the contested claims and processed at their Victorville plant, placed in grades 2 and 3 and shipped to various of their customers using fillers and extenders. (Tr. 417).

The contestant's mineral examiner testified that the deposits on the claims consisted of bands or lenses of carbonate rock within granitic and metamorphic rock. He was of the opinion that it was not possible to mine a clean carbonate material from any of the claims, except for very careful selective mining on the Largo Vista No. 5. (Tr. 104, 105). The professor of geology who testified for the contestant concluded in his report that the whiteness and texture of the limestone in the deposits are as variable as the composition, and highly selective mining would be required throughout to produce exceptionally white material. (Exh. 18 at p. 18). The consulting engineer, testifying for the contestee, stated that it took a lot of breaking to get a nice color, since only the rock in the deeper cuts is white, except for the small fractures. (Tr. 478).

The deposits on the claims are mostly a very low-grade limestone (calcium carbonate), grading in many places to a dolomite. (Tr. 110, 111, 135, 136).

It appears that the contestee is not interested in limestone for its use in the manufacture of cement. (Tr. 352). No objection is made on appeal to the Hearing Examiner's finding that the limestone deposits on the Largo Vista claims do not have the necessary chemical and physical qualities for use in the production of cement. Nor is issue taken with the finding that the limestone deposits within the Largo Vista claims do not possess the minimum requirements of the metallurgical and chemical trade as to the percentage of calcium carbonate.

Dr. Simmons, Vice President and General Manager, [illegible] Minerals and Chemicals, Inc., formerly known as Victorville Limestone [illegible] (Tr. [illegible]), [illegible] on the quarries beyond, testified that the material from the quarry (not the waste [illegible] removed herein) by selection and separation has been graded according to color: i.e., No. 1 is pure white and is supplied to [illegible] paper, since this is the most critical usage where white color is extremely important. No. 2 grade, which is slightly stained, is supplied for use in masonry cement, stucco, plaster and roofing granules; No. 3, or grades with discoloration somewhat darker than that of No. 2, is supplied for use in rubber floor tiles, oil well muds and the like; and the balance is designated as No. 4 and supplied to users where color is of no importance, such as foundry work, pipe coatings, asphalt fillers and stone dust (Tr. 392-393, 394 and Exh. 84). He testified that the No. 1 grade brought the highest price of all grades. (Tr. 393, 394). He testified that in addition to color his company requires a material of high carbonate content. He testified that the raw material from the large Plaza claims was the same as that produced from the company's own quarry, although not quite as high in calcium carbonate, and that the overall carbonate content would be identical. He also testified that 5,000 tons of material were removed from the contested claims and processed at their Victorville plant, placed in grades 2 and 3 and shipped to various of their customers using fillers and aggregates (Tr. 417).

The Contestant's mineral examiner testified that the deposits on the claims constitute no beds or lenses of carbonate-rock within a metamorphic complex. He stated his opinion that it was not possible to mine and select an adequate amount of material from any of the claims, except for very careful selection in the large Plaza No. 3. (Tr. 100, 101, 102). The professor of geology who testified for the contestant concluded in this respect that the coloration and texture of the limestone in the deposits are as variable as the geometries, and highly selective mining would be required throughout to produce exceptionally white material (Con. 15 at p. 18). The geologist employed, testifying for the contestee, stated that it took a lot of breaking to get white material since only the rock in the [illegible] would be white, except for the [illegible] fractures. (Tr. 478).

The deposits on the claims are mostly coarse-grained limestone (calcium carbonate), grading in many places to dolomite. (Tr. 100-101, 104, 110).

It appears that the contestee is not interested in limestone for its use in the manufacture of cement. (Tr. 413). No objection is made on appeal to the hearing examiner's finding that the limestone deposits on the [illegible] claims do not have the necessary chemical and physical qualities for use in the manufacture of cement. Nor is issue taken with the finding that the limestone deposits within the large Plaza claims do not possess the minimum requirements of the metallurgical and chemical grade as to the percentage of calcium carbonate.

In determining what constitutes a "common variety" of limestone used in the manufacture of Portland cement, the Associate Solicitor, Branch of Public Lands, in memorandum opinion M-36619, dated October 5, 1961, stated that limestone may be classified as a "common variety" within the meaning of section 3 of the act of July 23, 1955 (30 U.S.C. § 611 (1964)), unless it has some distinct and special properties not generally found in limestone deposits.

Considering the contestee's scale of grading and the uses made of grades Nos. 2, 3 and 4 in light of the act as implemented in regulation 43 CFR 3511.1(b), although the deposits may have value in trade, manufacture, the sciences or mechanical arts, they do not possess a distinct, special economic value for such uses over and above the normal uses of the general run of limestone deposits and are, therefore, common varieties of limestone. The testimony of the contestee's general manager was to the effect that the materials taken from the subject claims and processed were graded Nos. 2 and 3. Grade No. 1, the whitest material, has been excluded from this discussion as none has been shown to have been removed and processed from these claims.

The contestee also points to the fact that contestant's mining engineer did not take any samples from the Largo Vista Nos. 2 and 4 claims, and the fact that the professor did not have the assay results of his own samples at the time his report, Exhibit 18, was written, although he did examine one assay report furnished him by the Forest Service (Exhibit 7).

It is questionable whether the mining engineer of the Forest Service actually sampled the Largo Vista Nos. 2 and 4. There was some doubt as to the exact position of the claims on the ground, as they were in an oversized section. (Tr. 57, 58). Nevertheless, his testimony as to what he observed by visual examination of the nature and character of the material exposed on those claims has probative effect. Moreover, he sampled only those places pointed out to him by the contestee's representatives. United States v. Fischer Contracting Co., et al., A-28779 (August 21, 1962). The same principle holds for the report of the professor of geology, who made a visual examination of the claims, including the discovery cuts which were shown to him by the contestant's mining engineer. (Tr. 214, 253). Assay reports are not the sole means of determining the value of a mining claim. Cf. United States v. Northern Pacific Railway Co., 1 F. 2d 53 (1924).

The appellant requests that it be granted the privilege of oral argument. The appellant has not been limited in its right to submit its contentions on appeal. After careful consideration it is not believed that oral argument would be of any particular usefulness in this case. Therefore, the request for oral argument is denied. Big Piney Oil and Gas Co., A-29895 (July 27, 1964).

On the basis of the entire record made at the hearing, it is concluded that the Hearing Examiner's decision is supported by substantial evidence and, accordingly, it is hereby affirmed.

Chas. Pfizer & Co., Inc., is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers the six mining claims adversely affected by this decision the total filing fee will be #30. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed, the appellant will have the burden of proving wherein the decision appealed from is in error.

If an appeal is taken the adverse party to be served is:

Regional Attorney
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U. S. Department of Agriculture
25 Taylor Street - Room 624
San Francisco, California 94102

Newton Frishberg
Chief, Office of Appeals
and Hearings

Enclosures

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Regional Forester, Forest Service, U. S. Department of Agriculture, San Francisco
Office of the General Counsel, Division of Lands and Forestry, USDA, D.C.
Forest Service, Division of Watershed Management, USDA (12)
Hon. Lee Metcalf, United States Senate
Hon. Harold T. Johnson, House of Representatives
Hon. Arnold Olsen, House of Representatives
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Hearing Examiner John Wood (Sacramento)
Administrative Assistant, Appeals and Hearings
Gower Federal Service
Appeals List No. 1
WHW

appealed to Sec
A-31019
affirmed 8-21-69

Mining Claims: Contests (Answers) 1852.1-6, 1852.1-7

Under the Department's rules governing Government contests against mining claims, each contestee is required to answer within 30 days after he is served with a copy of the contest complaint, and where one of the contestees fails to file an answer the allegations of the complaint will be taken as admitted, and the mining claim which is the subject of the contest insofar as his interest is concerned will be declared null and void without a hearing.

Mining Claims: Hearings (Reporter's Fees) 1852.3-7

An objection to the requirement in a notice of hearing that a contestee in a Government contest against his mining claim make a deposit sufficient to defray his share of the reporter's fees must be made to the Hearing Examiner prior to or at the opening of the hearing and, if made for the first time after the hearing in an appeal to the Director, Bureau of Land Management, is considered waived.

The requirement imposed by a Hearing Examiner pursuant to regulation that a contestee make a deposit to defray his share of the reporter's fees prior to a hearing on a contest against his mining claim is reasonable and within the Secretary's authority to issue regulations necessary to carry out his duties to administer the public lands and process claims against them.

United States v. Curtis Holcomb et al., Contest No. 079864 (Sacramento) (May 31, 1968)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 JUN 14 AM 10 00

In reply refer to:
704
Contest No. 079864
(Sacramento)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

May 31, 1968

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America,
Contestant
v.
Curtis Holcomb,
Pauline L. Holcomb,
Don H. Hatfield and
Dolores V. Hatfield
Contestees

Feudin' Acres, Re-located Morning Star and Morning Star placer mining claims situated in Sec. 10, T. 20 N., R. 9 E., M.D.M., Sierra County, California, in Plumas National Forest. Recorded in Vol. 1, page 289; Vol. 6, pages 65 and 81; and Vol. 8, page 74, Placer Claim Records of Sierra County, California.

Decision Affirmed, as Modified

Curtis R. and Pauline L. Holcomb and Don H. and Dolores V. Hatfield have separately appealed from a decision of a Hearing Examiner dated November 22, 1967, which held null and void for lack of a discovery of a valuable mineral deposit the Morning Star association placer mining claim located in the N$\frac{1}{2}$NW$\frac{1}{4}$ Sec. 10, T. 20 N., R. 9 E., M.D.M., California, which includes both the former Feudin' Acres and the Re-located Morning Star claims.

Adverse proceedings were initiated against the mining claim, upon the recommendation of the Forest Service, U. S. Department of Agriculture, by the issuance of a contest complaint by the Sacramento land office on May 5, 1967, charging that: (1) there is not disclosed within the boundaries of the mining claim mineral materials of a variety subject to the mining laws, sufficient in quantity, quality and value to constitute a discovery, and (2) the land embraced within the claim is nonmineral in character. The complaint was served on May 9, 1967.

Curtis R. Holcomb and Pauline L. Holcomb were the only contestees to file an answer to the complaint. Neither the land office Manager nor the Hearing Examiner ruled on the failure of Don H. Hatfield and Dolores V. Hatfield to file an answer to the complaint. The Hatfields were required by departmental regulations to file an answer to the complaint within 30 days after service of the complaint, responding to the allegations of the complaint, or to have their failure to file an answer within the prescribed period taken as an admission of the truthfulness of those allegations. See 43 CFR 1852.1-6, 1852.1-7 and last paragraph of complaint. The requirements of the cited regulations are mandatory, and the Secretary of the Interior is

without authority to waive the rules. United States v. J. Hubert Smith, 67 I.D. 311 (1960); United States v. Owen O. Roberts, A-30825 (November 3, 1967). Therefore, since Don H. Hatfield and Dolores V. Hatfield failed to file an answer to the notice of charges in this contest proceeding, the allegations set out in the complaint are taken as admitted and, insofar as the Hatfields' interests are concerned, the Morning Star association placer claim is null and void. The Hearing Examiner's decision is modified to this extent.

A notice of hearing, dated August 17, 1967, set September 20, 1967, as the date for hearing. Paragraph 6 of the notice informed the parties that a verbatim stenographic record of the hearing would be made and that in order "/t/o cover the proportionate share of the reporter's fee the contestee or mining claimant will be required to make a deposit in the amount of $100.00 at the time of the hearing and such additional deposits as may be required by the Hearing Examiner in the course of the proceeding."

A hearing was held on the date and at the place scheduled. At the hearing the Government was represented by the Regional Attorney, Office of the General Counsel, U. S. Department of Agriculture, San Francisco, California. There was no appearance by or on behalf of the contestees. The United States presented the testimony of a mining engineer employed by the Forest Service, United States Department of Agriculture, who examined the claims. On the basis of the testimony, the Hearing Examiner held the claim invalid.

The contestees' appeals are identical and are confined to the sole contention that the Hearing Examiner's decision is ineffective on the ground that the requirement that they make a deposit for reporter's fees is contrary to due process guaranteed by the Fifth Amendment of the Constitution of the United States.

Before considering the merits of their argument, we note that the objection to the demand for a deposit was not timely made. It was not made prior to the hearing nor was it made at the hearing. An objection to the procedure to be followed at a hearing must be made before the hearing is held or when the hearing begins and, if not made then, it is considered waived. Adams v. Witmer, 271 F. 2d 29, 36-37 (9th Cir. 1959); United States v. Adams et al., 64 I.D. 221 (1957); United States v. Gordon Marshall et al., A-30843 (January 19, 1968).

Nevertheless, the demand for the deposit was in accordance with regulation 43 CFR 1852.3-7(b), which reads in pertinent part:

> Except where a party is relieved of paying the reporter's fees pursuant to subparagraph (3) of paragraph (a) of this section, each party shall be required by the examiner to make reasonable deposits for reporter's fees from time to time in advance of

> taking testimony. Such deposits must be sufficient to cover all reporter's fees for which the party may ultimately be liable under paragraph (a) of this section. * * * Reporter's fees will be at the rates established for the local courts, or, if the reporting is done pursuant to a contract, at the rates established by the contract. 1/

The regulation was issued under the provisions of 43 U.S.C. § 1201 (1964), which authorize the Secretary of the Interior to issue appropriate regulations to carry out his duties to administer the public lands and process claims against them. Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963). The mining law opens to acquisition mineral lands of the United States "under regulations prescribed by law." 30 U.S.C. § 22 (1964).

A similar provision has been part of the Department's regulations for many years and has often been upheld. United States v. Dawson, 58 I.D. 670, 672-673 (1944), and cases cited therein; Anna M. Livingston, 3 L.D. 193 (1884).

Therefore, the appellants' objection to the requirement of a deposit for reporter's fees set out in the notice of hearing is rejected. The holding would be the same even if the objection had been timely made.

The Summit Meadows Mining and Land Development Company, by its president, Don H. Hatfield, one of the contestees in this proceeding, filed a separate document entitled "Notice of Appeal and Reasons for Appeal." The company asserts that it is adversely affected by the decision of the Hearing Examiner in the instant case. It is alleged that the company is the lessee under a lease entered into on March 30, 1963, with Curtis R. Holcomb and Pauline L. Holcomb, his wife, for a certain tract of land which is described as: "N.$\frac{1}{2}$ of the N.W.$\frac{1}{4}$ of Section 10, T. 20 N., R. 9 E., M.D.M., Comprising a total of approximately 80 acres, excluding all existing valid claims and patented land." It is also alleged that said lease was recorded in the Office of the Recorder, Sierra County, Downieville, California, in Vol. 45, at page 205, and that the lease has remained in full force and effect at all times. It is contended by the company that the contest complaint and notice of hearing in the subject proceedings were ineffectual on the ground that the contestant failed to give notice to all of the parties who have an interest in the land in question.

1/ It may be noted that, under paragraph (a) of the regulation, if the contestee is ultimately successful in a Government contest against him, the Bureau must pay all reporter's fees otherwise payable by the contestee. Paragraph (a) also relieves a contestee of paying reporting costs, if he is financially unable to pay his share.

The company's contention is not meritorious. The contest proceeding was properly directed against the mining claim, and notice thereof was required to be served only on those persons claiming possessory title to the claim. There was no necessity for serving the lessee of lands in the claim with copies of the contest complaint and notice of hearing. Nevertheless, the company had, in fact, received notice or knowledge of both the complaint and the notice of hearing. Evidence of record shows that Don H. Hatfield was individually served with a copy of the complaint and a copy of the notice of hearing. Since Mr. Hatfield asserts that he is president of the Summit Meadows Mining and Land Development Company, knowledge or notice that has come to him in fact must be imputed as knowledge or notice to the company. 19 Am. Jur. 2d, Corporations § 1263 _et seq._

We have carefully reviewed the record of the testimony and evidence presented at the hearing. It was thoroughly summarized in the decision appealed from and need not be repeated here. The record sustains the finding of the Hearing Examiner that the testimony and evidence on behalf of the contestant established _prima facie_ proof that there was not a valuable mineral deposit on the combined association placer claim within the purview of the mining laws and the further finding that, in the absence of evidence to the contrary, this proof must be accepted. We, therefore, concur in the Hearing Examiner's decision declaring the Morning Star association placer mining claim null and void.

Accordingly, the decision appealed from is affirmed.

Mr. and Mrs. Holcomb, Mr. and Mrs. Hatfield and the Summit Meadows Mining and Land Development Company are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden wherein the decision appealed from is in error.

In the event an appeal is taken the adverse party to be served is:

Regional Attorney
Office of the General Counsel
U.S. Department of Agriculture
630 Sansome Street
San Francisco, California 94111

Frances A. Patton

Acting Chief, Office of Appeals
and Hearings

Enclosures 2
Dist. on page 5

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Mr. Curtis Holcomb (Certified Mail)
Mrs. Pauline Holcomb (Certified Mail)
Mr. Don H. Hatfield (Certified Mail)
Mrs. Dolores V. Hatfield (Certified Mail)
Summit Meadows Mining and Land Development Company (Certified Mail)
Regional Attorney, Office of the General Counsel, USDA, San Francisco, Calif.
Regional Forester, Forest Service, USDA, San Francisco, Calif.
Office of the General Counsel, Div. of Lands and Forestry, USDA, Wash., D.C.
Forest Service, Div. of Watershed Management, USDA, Wash., D.C. (12)
Hearing Examiner Graydon E. Holt (Sacramento)
OPD
Div. of L&M S&T (4)
Div. of L&M PM (2)
Administrative Assistant, Hearings
Gower Federal Service
Appeals List No. 1
WHW

DOCKET FILES

Appeals Procedure: Service on Adverse Party 1842.5-2

In the absence of proof showing that a copy of a statement of reasons for appeal was timely served upon the adverse party named in a Hearing Examiner's decision, an appeal to the Director, Bureau of Land Management, will be dismissed.

United States v. John M. DeBevoise, Mineral Contest No. Riverside 05869-A (June 15, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 JUN 29 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In reply refer to:
704
Mineral Contest No.
Riverside 05869-A

June 15, 1967

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America,
Contestant

John M. DeBevoise,
Contestee

Involving the Black Mountain Nos. 1, 2, 3, 4, 5 and 6 lode mining claims, located in Section 5, T. 14 S., R. 2 W., S.B.M., San Diego County, California

Appeal Dismissed

Mr. John M. DeBevoise has appealed from a Hearing Examiner's decision, dated June 27, 1966, which declared his above-identified lode mining claims null and void because each claim lacks a discovery of a valuable mineral deposit.

The June 27, 1966 decision named as the adverse party who must be served in the event of an appeal the contestant's counsel, George H. Wheatley, Esq., Officer of the Solicitor, U. S. Department of the Interior, 7759 Federal Building, 300 N. Los Angeles Street, Los Angeles, California.

The appellant's notice of appeal, which stated that a statement of the reasons for the appeal would be filed at a future date, was duly served on the adverse party. However, the record contains no evidence of service of the statement of reasons on the adverse party.

On May 2, 1967 this office requested Mr. DeBevoise to furnish proof of service of his statement of reasons on the adverse party. He replied that he could not find the proof but believed that he did serve the adverse party. After receipt of Mr. DeBevoise's reply, this office then directed an inquiry to the Office of the Solicitor at Los Angeles and was informed by reply of May 31, 1967 that their records do not disclose that they have been served with a copy of the statement of reasons for the appeal.

Accordingly, the appeal must be summarily dismissed in accordance with the regulations in 43 CFR 1842.5-2 and 1840.0-7.

Mr. John M. DeBevoise is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each claim included in the appeal. If the appeal covers all six claims adversely affected by this decision the total filing fee will be $30. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

If an appeal is taken, the adverse party to be served is:

Mr. George H. Wheatley
Office of the Solicitor
U. S. Department of the Interior
7759 Federal Building
300 N. Los Angeles Street
Los Angeles, California 90012

Frances A. Patton
Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures (2)

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Office of Hearing Examiners, Sacramento, Calif.
Ap. & He. R/F
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Div of L&M PM (2)
Adm. Asst., Ap. & He.
Gower Federal Service
OPD
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DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 JUN 21 PM 2 44

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In reply refer to:
704
Sacramento 387-A

June 19, 1967

DECISION

Eva A. McDanel : Lode mining claims
:
:

Decision Vacated

Mrs. Eva A. McDanel has appealed from a decision of our Sacramento land office dated February 13, 1967, which declared her Little Banner and Little Banner No. 2 lode mining claims null and void *ab initio* for the reason that they were located February 16, 1935 on land not available for mining location because of being withdrawn in connection with Federal Power Project No. 201.

The appellant asserts that her title derives from locations made after the lands had been restored to mining location.

The record indicates that the claims of the appellant were located in November 1935, after the restoration of the lands October 4, 1935.

Accordingly, the decision below is vacated, and the case is remanded to the land office, through our State Director for California, for further appropriate action.

Frances A. Patton
Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

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Mining Claims: Withdrawn Land: Reclamation Withdrawals 3400.1 and 3400.4

Land that is subject to a first form reclamation withdrawal is not open to mineral entry, and any mineral locations made on such land after the withdrawal are null and void and can confer no rights upon the locators.

The Secretary of the Interior has legislative authority to withdraw land for reclamation purposes under the authority of section 3 of the reclamation act of 1902.

Mining Claims: Determination of Validity 3400.1

Although a mining claimant may not have any rights based on a location or amended location made subsequent to a withdrawal of the land from mining location, he is not precluded from establishing that he has possessory rights based on a mining claim made and perfected prior to a withdrawal or segregation of the land from mining locations.

C. C. Decker, Sacramento 079623 (June 19, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 JUN 29 AM 10 00

In reply refer to:
704
Sacramento 079623

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

June 19, 1967

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

C. C. Decker, Mining Claimant	: : : : : :	Involving the Riverside No. 4, also known as River Side No. 4, mining claim located in the NE¼SE¼ of Sec. 26, T. 9 N., R. 10 E., M.D.M., California

Decision Affirmed

Mr. C. C. Decker has appealed from a decision of the Sacramento, California, land office, dated July 20, 1965 and amended August 12, 1965, which declared the above-named mining claim null and void *ab initio* because at the time of location of the claim on April 1, 1959, the NE¼SE¼ of said Section 26 was withdrawn from mining location, having been withdrawn under a first form reclamation withdrawal, effective January 15, 1942, 1/ pursuant to section 3 of the reclamation act of June 17, 1902 (32 Stat. 388; 43 U.S.C. § 416).

The land office decision, conforming to a mining claim location abstract in the case file, contains a metes and bounds description of the claim, as follows:

> Commencing at a point 2600 feet south and 600 feet east of the Northeast corner of the NE¼ of sec. 26; thence 1320 feet south; thence 600 feet west; thence 1320 feet north; thence 600 feet east of the point of beginning. (Underscoring added).

A machine copy of the notice of location of the claim recently received in this office shows that the following should be substituted in place of the hereinabove underscored portions of the description: 2,640 feet instead of 2,600 feet and west instead of east. The statement in the decision that the claim is located in the NE¼SE¼ of section 26 is, however, correct, and the errors noted are not material to the correctness of the determination by the land office.

The Department has consistently held since the inception of the 1902 Reclamation Act that land that is subject to a first form reclamation withdrawal is not open to mineral entry, and any mineral locations made on such land after the withdrawal are null and void and can confer no

---

1/ Although it is not material to the holding in this case, the withdrawal order was filed with the *Federal Register* on January 27, 1942 and published therein on January 28, 1942 (7 F.R. 568). The segregative effect of the withdrawal did not take place until January 27, 1942, the date on which it was filed in the *Federal Register*. See 44 U.S.C. §§ 305(a) and 307, and Solicitor Opinion M-36382 of October 24, 1956, *Effective Date of Orders Withdrawing Public Lands for Reclamation Purposes*.

rights upon the locators. See Robert K. Foster et al., A-29857 (June 15, 1964) and Ted W. Fay et al., A-29781 (January 30, 1964), and the cases cited therein.

The appellant asserts that the existing claim was established on August 1, 1938 and that he holds under such claim, inferring that the claim in question is an amendment or a continuation of a claim which was located before the land was withdrawn from location. In considering a similar contention, the Department, in J. Everett Nelson, A-29174 (February 4, 1963), said: "However, although the claims located in 1934 are void, whether considered to be original locations or amended locations of earlier claims, the appellant would not lose his rights in any such earlier claims to which he succeeded in interest. But, for the appellant to be considered as having possessory rights against the United States with respect to such earlier claims, he will have to come forward with adequate evidence to establish that the claims were in fact located prior to the date of any withdrawal of the lands from mining locations, that he is the true successor in interest of the original claimants having an unbroken chain of title from them, and that the lands claimed by him are the same lands as those originally located. If he can establish those facts, then other questions will have to be considered such as whether the original claims were perfected by reason of a valid discovery before the withdrawal and whether any rights were lost by abandonment before there can be a final determination as to the appellant's rights with respect to such claims." See also Metaline Contact Mines et al., A-29707 (December 11, 1963).

Therefore, the appellant's mining claim which is based on a location made subsequent to the effective date of withdrawal of the land must be considered as null and void ab initio. However, this determination does not preclude the appellant from establishing that he has possessory rights to the land involved based on a mining claim perfected prior to any withdrawal or segregation of the land.

The appellant further asserts that the declaration or letter withdrawing from location the land in question was invalid and without authority. This assertion is without merit and is opposed to the fact. The Secretary of the Interior has legislative authority to withdraw land for reclamation purposes under the authority of section 3 of the reclamation act of 1902. See 43 U.S.C. § 416 (1964).

Accordingly, the land office decision is correct, and it is hereby affirmed.

Mr. C. C. Decker is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures (2)

DISTRIBUTION:
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Div. of L&M PM (2)
Gower Federal Service
OPD
Appeals List No. 1
PLS

DOCKET FILES

Mineral Material Sales: Extensions 3611

It is not proper to reject an application for extension of time to complete removal of mineral materials under a sales contract because the application was not filed more than 30 days prior to the expiration date of the contract where the purchaser has shown, prior to the expiration date of the contract, that his failure to complete removal of the materials and to submit a timely extension request was due to causes which occurred without his fault or negligence less than 30 days prior to the expiration date of the contract, and where no rights of any third party have attached and the interests of the United States will not be adversely affected by granting an extension of time.

Martin V. Dominguez, Riverside 06486 (June 22, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 JUN 29 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In Reply Refer to:
704
Riverside 06486

June 22, 1967

DECISION

Martin V. Dominguez : Mineral Materials Sale

Decision Reversed

Mr. Martin V. Dominguez has appealed from a decision of our Riverside district and land office dated May 12, 1966, which denied his request for a 60-day extension to complete removal of mineral materials purchased under contract Riverside 06486, for the reason that his request was not timely filed and the contract agreement does not provide for such extension.

The contract, Riverside 06486, was issued November 22, 1965, to Mr. Dominguez permitting him a period of 6 months to remove 500 tons of driftwood decorative stone, after he had paid $500, the appraised price of the stone, and also had posted a compliance bond in the amount of $200. The contract was issued on standard Bureau Form 4-1551 (May 1961), modified by deletion of so much of Sections 3 and 12 that provided for an extension of the contract period. [1]

During the six months' period of the contract, Mr. Dominguez reported removal of 282.7 tons of stone. His request for a 60-day extension was filed May 4, 1966, with an explanation that breakdown of his equipment precluded him from recovering all the rock purchased under the contract before May 21, 1966, the expiration date of the period allowed in the contract.

The appeal relates in detail the misfortunes which befell Mr. Dominguez in his operations of removing the rock, and which, it is contended, are the reasons why the amount of rock purchased was not timely removed from the Government land, and also why he did not file his application for extension more than 30 days prior to the expiration date of the contract as provided in the regulations.

The pertinent regulation, 43 CFR 3611.8-6, provides that if the purchaser shows that delay in removal of materials was due to causes beyond his control and without his fault or negligence, the authorized officer may grant an extension of time, not to exceed one year, upon written request of the purchaser. The request must be filed not less than 30 days prior to the expiration date of the contract.

---

[1] There is no authority in the regulations permitting deletion of the right to an extension from the contract agreement.

Although the request of Mr. Dominguez for the 60-day extension was not filed within the period set forth in the regulations, his reasons for delay in removal of the rock, as well as his reason for late filing, are sound and acceptable. In other situations where the regulations spell out a specific time period for filing of documents, such as applications for approval of assignments of oil and gas leases, the Department has held that the specific period may be waived upon acceptable showing for the delay and where no rights of any third party have attached or the interests of the United States will not be adversely affected by granting the approval sought. Cf. Alice R. Rudie, A-30061 (March 25, 1964).

The appellant here has offered an acceptable explanation of his failure to file his application for extension no later than 30 days prior to the expiration date of the contract, as well as for his failure to complete removal of the rock within the time allowed. The record before us does not show any intervening interest in the mineral materials involved which would be adversely affected by granting the requested extension. Nor is there any indication that granting the extension would bring any consequent disadvantage to the United States.

In these circumstances and since the regulation governing extensions has not been interpreted as making the requirement for filing not less than 30 days prior to the expiration date of the contract mandatory, the purchaser's failure to file his application for extension timely does not of itself compel denial of the request.

Further consideration should be given to the request for a 60-day extension to the contract. The decision below is reversed.

The case file is returned to the Riverside district and land office for further appropriate action not inconsistent herewith.

Newton Frishberg

Chief, Office of Appeals and Hearings

DISTRIBUTION:

Rex Estudillo, Attorney for Appellant
Martin V. Dominguez
SD (California)
Appeals and Hearings Reading File
DDRF 1 & 2
Binder
Case File
Appeals List No. 1
DEH

DOCKET FILES

Mining Claims: Discovery 3413

Placer mining claims are properly declared null and void and a patent application is properly rejected where the value of gold found is so slight that a person of ordinary prudence would not be justified in the further expenditure of labor and means with a reasonable prospect of success in developing a valuable mine, as there has not been a valid discovery within the meaning of the mining laws.

United States v. Techtro-Matic Corporation, Contest Riverside 01425 (June 22, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 JUL 7 PM 3 02

In reply refer to:
704
Mineral Patent Application
Riverside 01425

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

June 22, 1967

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America :
Contestant :
:
v. :
:
Techtro-Matic Corporation :
Contestee :
:
:

Involving the Mormon Diggings, Mormon Diggings Annex and Mormon Diggings Annex No. 1 placer mining claims, located in Sections 20 and 21, T. 3 N., R. 5 W., S.B.M., San Bernardino County, California

Decision Affirmed

Techtro-Matic Corporation has appealed from a Hearing Examiner's decision, dated August 3, 1966, declaring its Mormon Diggings, Mormon Diggings Annex and Mormon Diggings Annex No. 1 placer mining claims null and void for the lack of discoveries of valuable mineral deposits on any of the claims within the meaning of the mining laws, and rejecting its mineral patent application Riverside 01425 for the claims.

This proceeding was initiated by the Bureau of Land Management in behalf of the United States as a result of the patent application filed by the contestee corporation.

Hearings were held on May 19, 1965, and March 15, 1966. After the first hearing the Examiner issued an order for a joint sampling of the claims, which sampling was accomplished on August 31, 1965, before the second hearing.

Tom H. W. Loomis, after having been duly qualified as a mining engineer, testified for the contestant. George O. Hedrick, the predecessor in interest of Techtro-Matic Corporation, and Clifford Taylor, the manager of, and a partner in, the Hesperia Smelting and Refining Company, testified for the contestee.

The uncontroverted facts gleaned from a careful review and analysis of the testimony and documentary evidence presented at the hearings are that the topography of the claims is comprised of gentle flowing slopes with moderate ridges, the underlying formations being of the Pleistocene Age. Mr. Loomis examined the claims in May 1963, January 1964 and May 1965. On his first visit there were only some very old shallow workings, and he detected some colors of gold in a gully. In January 1964 six

40-inch bucket auger holes up to 24 feet deep had been drilled, and six additional holes were drilled while he was present. The material removed from the holes was placed in cone-shaped piles. A sample was taken from the axis of each cone-shaped pile, twelve samples in all. Five of the samples had gold assay values ranging from $0.13 to $0.45 per yard, one contained $0.025 per ton, while the remaining samples contained only a trace or no gold. Platinum and palladium values of all samples were reported as "nil" (Exs. 4-8 incl.).

Mr. Hedrick, who sank the auger holes, also took a sample from each of the twelve holes, as well as samples of about 500 pounds of material from each of two dozer cuts, fourteen samples in all. Each time that the dozer scraped material from the cut he took a shovelful of material from the mound. He also represented the contestee in taking the joint samples on August 31, 1965. In addition to the joint sampling, he took samples comprised of shovelsful of material removed from the mounds at each end of the two dozer cuts.

Mr. Taylor performed mill tests on the fourteen samples delivered to him by Mr. Hedrick. Ten of the samples contained 2,000 to 2,400 pounds of material and four of them contained 500 to 1,500 pounds. The mill test reports (Ex. F) show that the concentrates contained high gold, platinum and palladium values, ranging from $49.80 to $3,161.00 per ton. The amount of bank-run material required to produce one ton of concentrates has not been shown and the reports do not show the value of the recoverable minerals in each ton of material tested.

Mr. Taylor also fire assayed ten samples, eight of which were split samples taken during the joint sampling in August 1965. Nine of the samples had combined gold and silver assay values ranging from $0.45 to $4.05 a ton. The remaining sample had a gold assay value of $234.50 per ton and a trace of silver (Ex. G). Mr. Taylor is not a mining engineer but derived his knowledge of assaying and mill testing from experience. The Hesperia Smelting and Refining Company had smelted only one ton of material since it commenced operations in 1962. Mr. Taylor described his method for making the fire assays.

Mr. Loomis then testified on rebuttal that the assay procedures followed by Mr. Taylor were not the procedures normally followed in assaying placer material. He stated that placer material is not ground, but is generally screened to remove coarse material, run over riffles or tables, and sometimes amalgamated to remove the free gold. The procedures followed by Mr. Taylor are those used to assay hard rock material which is crushed, ground and fire assayed. A fire assay would show all or most of the gold in the rock, all of which may or may not be recoverable by normal placer recovery methods.

The Government submitted in evidence as Exhibit 20 a joint statement describing the joint sampling conducted on August 31, 1965. The report showed three samples taken from the Mormon Diggings claim: a 300-pound vertical channel sample was taken from the wall of each of two bulldozer cuts, and the third sample of 50 pounds of material was removed from the axis of the cutting pile of one of the auger holes. On the Mormon Diggings Annex claim, a 60-pound vertical channel sample was cut from the bank of a bulldozer cut at the original discovery point, while 50-pound samples were removed from the axes of the cutting piles of two of the auger holes. On the Mormon Diggings Annex No. 1 claim a 150-pound vertical channel sample was cut from the bank of one bulldozer cut and a 100-pound vertical channel sample was cut from the bank of a second bulldozer cut. The assay report of the 8 samples by Abbot A. Hanks of San Francisco indicates that the samples were handled in a manner closely simulating the process used in commercial placer recovery plants. Seven of the eight samples fire assayed for gold at "nil" and the remaining sample contained less than .005 troy ounces of gold per ton. Assays for the platinum group were also "nil" on the eight samples.

In determining the rights of mining claimants, the "prudent man" test has long been the guide as to whether or not a valid discovery has been made under the mining laws. That test, as set forth in Castle v. Womble, 19 L.D. 455 (1894), approved in Chrisman v. Miller, 197 U.S. 313 (1905), and more recently reaffirmed in Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963), and Mulkern v. Hammit, 326 F. 2d 896 (9th Cir. 1964), is that:

> . . .where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of . . . [a discovery] have been met.

Where the value of gold found is so slight that a person of ordinary prudence would not be justified in the further expenditure of labor and means with a reasonable prospect of success in developing a valuable mine, there has not been a valid discovery within the meaning of the mining laws. See United States v. John L. Cooper et al., A-30267 (May 11, 1965); United States v. Vernon O. and Ina C. White, 72 I.D. 522 (1965); United States v. Richard L. and Nellie V. Effenbeck, A-29113 (January 15, 1963).

The appellant contends that the Examiner's decision is contrary to the evidence because (a) the assay reports and testimony of Clifford Taylor were brushed off and disregarded by the Examiner, and the full effect of the evidence ignored; and (b) the values found in various assays in evidence favorable to the contestee were minimized or ignored and arbitrarily declared to be of insufficient value to constitute a valid discovery of a valuable mineral deposit.

These contentions are without merit. It is clearly evident that the Examiner did not ignore the values found in the assays purportedly favorable to the contestee, but that he placed them in their true perspective by pointing out wherein they were deficient and not representative when he stated:

> The mill test reports (Ex. F) of samples taken by the contestee reflect substantial values. However, the values shown are the values of concentrates. The amount of material necessary to produce one ton of such concentrates has not been shown. Thus, the mill tests do not reflect the value of the material in place. The highest values were not in gold, but in platinum and palladium. The assay values shown in Exhibit G, having been determined by fire assay, may, or may not, be recoverable by normal placer recovery methods.
>
> The more probative evidence of the recoverable mineral values borne by the materials exposed on the claims is that emanating from the joint sampling. Representative samples were taken from the material in place, in the presence of both parties, and submitted to a recognized assayer for determination of the amount of gold, silver, and platinum group minerals recoverable by normal placer recovery methods. The contestee has not challenged the sampling methods or assaying procedures which were employed. The assay results of the joint sampling confirm the results of the contestant's previous sampling, and are accorded greater weight than the assay results reported by the contestee.

Appellant further contends that the Examiner's decision was arbitrary and contrary to the evidence in that (a) the Government refused to take samples from piles of freshly excavated dirt at the end of trenches dug during the joint sampling, the Government witness admitting on cross-examination that the mineral deposits in the area were such that their presence might be found in just such places rather than in the methods insisted upon by the Government in the joint sampling; and (b) the Government engineer on cross-examination admitted that if the minerals occurred in placer pockets they were more likely to be found in the piles of dirt so dumped at the end of trenches than in the vertical samples taken at the insistence of the Government, which vertical samplings were more fitted to ascertain stratified deposits.

These contentions are not accurate representations of the testimony of the Government witness. The cross-examination referred to is that by the contestee's attorney, which is found on pages 66 to 68 of the transcript for the March 15, 1966 hearing, as follows:

> Q Mr. Loomis, isn't it true placer gold occurs in pockets?
>
> A Usually, yes.
>
> Q If you have a dozer cut on, say, 100 feet with a clean wall, perhaps five feet high and 100 feet long and one side of the cut, is there a certainty that the gold will be evenly distributed if gold is present throughout the wall of the cut?
>
> A No, there is no certainty.
>
> Q Isn't it perfectly possible the gold under those circumstances might occur in pockets?
>
> A It might well be.
>
> Q What was the method of sampling used in the joint assaying, the joint sampling whereby a certain spot was selected? Is it that a cut was made in the wall and the material scraped from that section was selected and the material so removed was then taken--is it on that basis--is it true that if you use that method you might not hit the pocket of gold?
>
> A That is possible.
>
> Q On the other hand, where a dozer goes through and excavates a substantial portion of earth and tumbles it all together at the end of a cut, isn't it possible that in that tumbled mass of dirt at the end of the cut, the gold contained in any of the pockets occurring in the cut, might be found?
>
> A It could be.

Q Actually, as a matter of fact, isn't it just as possible that out of several tons of earth at the end of a dozer cut you are likely to find evidence of gold which occurred in pockets in the cut as you would be arbitrarily selecting one place of one or two feet in the wall of a cut?

A You have a chance of getting a diluted value or no value at all or a concentration.

Q If there was gold literally at the end of the cut when the dozer had piled the dirt, would you not find it if there was gold?

A Possibly.

Q Where else would you find it?

A If you have a side of the wall cut and through a long stream bank and you have the bedrock or false bedrock exposed in the cut, you take a channel sample down to it, including the bedrock. You have the best chance of picking up any traces of gold that might be in the area.

Q Assuming that is stratified material. But if gold were to occur in pockets, then the gold would be accumulated, would it not?

A Well, yes.

Lastly, the appellant contends that the Examiner's decision is more calculated to support the claim of the Southern Pacific Railroad for constructing the right-of-way over the lands in question rather than to do adequate justice to the contestee's claims and the evidence adduced by contestee in support thereof. This allegation is without any foundation in the record. There was no evidence whatsoever introduced at the hearings or in the pleadings concerning a right-of-way of the Southern Pacific Railroad. The record in the case supports the Hearing Examiner's decision.

The appellant filed with its statement of reasons for appeal a request for an opportunity to present evidence on an issue of fact at another hearing. The request did not state the issue or issues of fact to be involved in such a hearing but, presumably, the desire is to have a supplemental hearing covering the factual issues raised in its statement of reasons for appeal. It has not been shown, however, that a further hearing would serve any useful purpose. Accordingly, the appellant's request is denied. See United States v. Gilbert C. Wedertz, 71 I.D. 368, 374 (1964).

The Hearing Examiner's decision is affirmed.

Techtro-Matic Corporation is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each claim included in the appeal. If the appeal covers all three claims adversely affected by this decision the total filing fee will be $15. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken, the adverse party to be served is:

George H. Wheatley, Attorney
Office of the Solicitor
U. S. Department of the Interior
7759 Federal Building
300 N. Los Angeles Street
Los Angeles, California 90012

Newton Frishberg
Chief, Office of Appeals
and Hearings

Enclosures (2)

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Adm. Asst., Hearings
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Div. of L&M PM (2)
Appeals List No. 1
Gower Federal Service
OPD
PLS

appealed to Sec.
List 2-9-68 affirmed A-30854 1-10-68

DOCKET FILES

Mining Claims: Lands Subject to 3400.1

Mining claims located on land withdrawn from such entry are null and void *ab initio* and confer no rights upon the locators or claimants.

Armin Speckert, Sacramento 060277-S, etc. (June 27, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 JUL 7 PM 3 02

In reply refer to:
704
Sacramento 060277-S
060277-U

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

June 27, 1967

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Armin Speckert : Placer Mining Claims
:
Decisions Affirmed

Mr. Armin Speckert has appealed from decisions of our Sacramento land office dated January 24 and March 28, 1967, which respectively declared his Glacier No. 2 placer mining claim and his Dominion Nos. 1 and 2 placer mining claims null and void *ab initio* for the reason that the lands were not subject to location when the claims were located because of being withdrawn by a power site classification order.

The appellant denies his claims are within the area withdrawn for power site purposes and requests a hearing on the factual situation.

The records of the land office show that all public land in T. 26 N., R. 8 E., M.D.M., California, the smallest legal subdivision of which, when surveyed, lies within one half mile of the North Fork of Feather River, was withdrawn from entry, location or other disposal pursuant to Section 24 of the Federal Power Act (16 U.S.C. § 818 (1964)) in Power Site Classification No. 179, dated May 13, 1927. After acceptance of the plat of survey of T. 26 N., R. 8 E., M.D.M., January 22, 1942, the withdrawal was conformed to lots 3, 4, 5, 6, SW¼NE¼, S½NW¼, N½SW¼, W½SE¼ section 4, lots 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, SE¼NE¼, E½SW¼ section 5, lots 1, 2, 3, W½NE¼, E½NW¼, NW¼SE¼, E½SE¼ section 8, lots 1, 2, 3, 4, 5, 6, 7, 8, NW¼NE¼, W½SW¼ section 9, in the area pertinent to the subject claims. The land in Power Site Classification No. 179 has not been restored to entry, pursuant to Section 24 of the Federal Power Act, *supra*. The claims lie within the Plumas National Forest.

The location notices recite that the Dominion Nos. 1 and 2 placer mining claims were located July 13, 1928, and that Glacier No. 2 placer mining claim was located November 27, 1928. Although the location notices do not recite the exact location of each claim, on-the-ground examination by representatives of the Forest Service, United States Department of Agriculture, has identified the claims as being within the surveyed subdivisions of T. 26 N., R. 8 E., M.D.M., as follows:

Dominion No. 1: lots 5, 6, N½SW¼, W½SE¼ section 4
Dominion No. 2: S½NW¼, N½SW¼ section 4; lot 8, SE¼NE¼ section 5
Glacier No. 2: lot 3, SW¼NE¼, N½SE¼ section 8; lot 4, NW¼SW¼ section 9

A mining claim located before August 11, 1955, on land within an existing power site reserve is null and void because the land was then unavailable for mining location. Wayne England, A-30088 (April 13, 1964). See also John Rovetto, A-27521 (December 9, 1957). Prior to the passage of the Act of August 11, 1955, lands embraced in an existing power site withdrawal were not open to mining location, and a mining claim located subsequent to a withdrawal of the land for power site purposes, but prior to passage of the act, is null and void where the land embraced in the claim had not been restored to entry under Section 24 of the Federal Power Act at the time of location. Day Mines, Inc., 65 I.D. 145 (1958).

As the land in the Dominion Nos. 1 and 2 placer mining claims and the Glacier No. 2 placer mining claim was withdrawn from location and entry at the time the claims were located, the land office actions in declaring them null and void ab initio was correct. The decisions appealed from are affirmed.

Oral argument in this proceeding will not be allowed as the entire issue is settled by the records of the Department of the Interior. No hearing is required to declare mining claims null and void ab initio where the records of the Department show that at the time of location of the claims the land was not open to such location. David W. Harper, et al., A-30719 (May 15, 1967).

As stated in the decisions below, these actions are without prejudice to the right of the claimant to make new locations, in the absence of intervening rights, on any lands which might now be available to mining location. Compliance with the general mining laws, including a valid discovery, as well as the particular requirements of the Act of August 11, 1955 (30 U.S.C. § 621 (1964)), will be necessary to support any such locations. Also, any new location now made will be subject to the restrictions and limitations imposed by Section 4 of the Act of July 23, 1955 (30 U.S.C. § § 611-615 (1964)).

Mr. Armin Speckert is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers all three mining claims adversely affected by this decision the total filing fee will be $15. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2
Dist. on page 3

DISTRIBUTION:
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Armin Speckert
Regional Forester, USDA (San Francisco)
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Div L&M S&T (4)
Div L&M PM (2)
OPD
Gower Federal Service
Appeals List No. 1
DEH

appealed to Sec.
affirmed A-30864 9-25-67

In reply refer to:
704
Contest No. 079499
(Sacramento)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

June 29, 1967

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DOCKET FILE

DECISION

United States, Contestant v. Golden Eagle Mining Corporation, Contestee	White Wolf Millsite situated in Sec. 23, T. 3 S., R. 19 E., M.D.M., recorded in Vol. V, page 137, Official Records of Mariposa County, California.

Appeal Dismissed

Golden Eagle Mining Corporation has appealed from a decision dated May 19, 1966, by a Hearing Examiner, declaring null and void the White Wolf Millsite situated in Sec. 23, T. 3 S., R. 19 E., M.D.M., California.

The Hearing Examiner's decision was served on the attorney for the contestee on May 21, 1966. On June 23, 1966, a notice of appeal, mailed on June 16 and unaccompanied by a filing fee, was filed in the Office of Hearing Examiners, Sacramento, California. On June 24, 1966, a filing fee of $5 was mailed to the Office of Hearing Examiners, where it was received on June 27. The transmittal letter stated that the filing fee was inadvertently omitted when the papers were sent in for filing.

The regulations in 43 CFR Part 1840 relating to appeals to the Director, Bureau of Land Management, **provide in pertinent part:**

> **§ 1842.4 Appeal; how taken, filing fee, mandatory time limit.** (a) . . . The notice of appeal . . . must be transmitted in time to be filed in the office where it is required to be filed within 30 days after the person taking the appeal is served with the decision he is appealing from. . . .
>
> (b) . . . The filing fee should accompany the notice of appeal but in any event must be received in the office where the notice of appeal is required to be filed within the time allowed for filing the notice of appeal.
>
> (c) No extension of time will be granted for filing the notice of appeal or paying the filing fee. . . . If . . . the filing fee is paid during the grace period provided in § 1840.0-6(a) and (b) and the delay in filing is not waived, as provided in that section, the notice of appeal will not be considered and the case will be closed by the Director.

1967 JUL 7 PM 3 00
DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

Section 1840.0-6 refers to waiver of the penalty for late filing of a document if it is filed not later than 10 days after it was required to be filed and if it was transmitted for filing (postmarked) within the period in which it was required to be filed. The rule is inapplicable here because the filing fee was not sent until after June 20, 1966, the last day of the 30-day period in which it was required to be paid, although it was received within 10 days thereafter.

The Department's rules are mandatory in requiring the closing of the case without consideration of the appeal in the circumstances presented here. Cf. C. Bland Jamison, A-29126 (February 19, 1962).

Accordingly, the appeal is dismissed.

Golden Eagle Mining Corporation is allowed the right of appeal herefrom to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240, and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

In the event an appeal is taken the adverse party to be served is:

Regional Attorney
Office of the General Counsel
U.S. Department of Agriculture
630 Sansome Street, Room 860
San Francisco, California 94111

Frances A. Patton
Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
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Mr. Earl A. Williams, President, Golden Eagle Mining Corporation
Regional Attorney, Office of the General Counsel, U.S. Dept. of Agriculture
Regional Forester, Forest Service, U.S. Dept. of Agriculture
Div. of Watershed Management, Forest Service, U.S. Dept. of Agriculture (12)
Office of the General Counsel, Div. of Lands and Forestry, U.S. Dept. of Agriculture (2)
Hearing Examiner John A. Wood, Office of Hearing Examiners (Sacramento)
Administrative Assistant, Hearings
Hon. George Murphy, United States Senate
Hon. Harold T. (Bizz) Johnson, House of Representatives
Div. of L&M PM (2); Div. of L&M S&T (4)
OPD; Gower Federal Service
Appeals List No. 1; WHW

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

DOCKET FILE

1967 JUL 12 PM 2 54

Mining Claims: Lands Subject to 3400.1

Mining claims located on land withdrawn from such entry are null and void *ab initio* and confer no rights upon the locators or claimants.

Nicholas S. Munson, et al., Sacramento 570 (July 5, 1967)

In reply refer to:
704
Sacramento 570

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

July 5, 1967

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Nicholas S. Munson : Lode Mining Claim
Beverly A. Munson :
:

Decision Affirmed, as Modified

Mr. Nicholas S. Munson has appealed from a decision of our Sacramento land office dated June 2, 1967, which declared his Amber lode mining claim, located August 10, 1962, within the W½SW¼NW¼ section 29, T. 37 N., R. 7 W., M.D.M., California, in Trinity County, within the Shasta National Forest, California, null and void ab initio for the reason that the claim was located on land withdrawn from mineral entry for reclamation purposes. The land office decision recited that lot 2 and that portion of M.S. 2081 within the SE¼NW¼ section 29, T. 37 N., R. 7 W., were withdrawn for the Central Valley Project by an order published March 16, 1956 (21 F.R. 1677-8).

The appellant states the Amber lode mining claim is within the W½SW¼NW¼ section 29, T. 37 N., R. 7 W., and is not in the SE¼NW¼, the area listed in the land office decision.

Review of the record discloses that the naming of the SE¼NW¼ instead of the SW¼NW¼ in the land office decision was an inadvertent typographical error. The record reflects that lot 2 and a portion of M.S. 2081 comprise the entire SW¼NW¼ section 29, T. 37 N., R. 7 W., M.D.M., and that they were withdrawn from location and entry by a withdrawal of the first form for reclamation under Section 3 of the Act of June 17, 1902 (43 U.S.C. § 416 (1964)), published March 16, 1956, in 21 F.R. 1677-8.

Land that is subject to a first form reclamation withdrawal is not open to mineral entry, and any mineral location made on such land after the date of withdrawal is null and void, and can confer no rights upon the locators or claimants. Robert K. Foster, et al., A-29857 (June 15, 1964), affirmed in Foster v. Jensen, Civil No. 64-1110-WM, United States District Court for the Southern District of California (September 13, 1966).

As the land embraced in the Amber lode mining claim was withdrawn from location at the time the claim was located, the land office was correct in declaring it null and void, ab initio.

The decision appealed from is affirmed, as modified herein by correction of the land description.

Mr. Nicholas S. Munson and Mrs. Beverly A. Munson are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Frances A. Patton
Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
Mr. Nicholas S. Munson (Certified Mail)
Mrs. Beverly A. Munson
Regional Forester, United States Department of Agriculture
FS, USDA, Div Watershed Mgmnt (12)
Div L&M S&T (4)
Div L&M PM (2)
OPD
Gower Federal Service
Appeals List No. 1
DEH

appealed to Sec,
affirmed A-30867
2-28-68

DOCKET FILE

Multiple Mineral Development: Act of July 23, 1955: Verified Statement
3512.9

In a proceeding under section 5(c) of the Act of July 23, 1955, to determine the rights of a mining claimant to the surface resources of his claim, it must be shown that there has been a valid discovery within the meaning of the mining laws made within the limits of his claim to prevent its being subject to the terms and limitations of section 4 of that act.

Mining Claim: Discovery 3413

The mere willingness of a mining claimant to expend further time and money in exploration is insufficient to establish the presence of a discovery on a mining claim.

Although a mining claim may have possibly been valuable for minerals in the past, there is no discovery when it is not shown as a present fact that the claim is valuable for minerals.

United States v. David L. King et al., Sacramento PL 45-1 (July 7, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 JUL 17 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In reply refer to:
704
Sacramento PL 45-1

July 7, 1967

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America, Contestant
v.
David L. King *et al.*, Contestees

Involving the Johnny Boy mining claim located in the NE$\frac{1}{4}$ Sec. 10, T. 22 N., R. 11 E., M.D.M., Plumas County, California (within the Plumas National Forest).

Decision Affirmed

David L. King has appealed from a Hearing Examiner's decision, dated October 24, 1966, which held that a discovery of a valuable mineral deposit has not been made on the Johnny Boy mining claim and that the claim is, therefore, subject to the provisions of section 4 of the act of July 23, 1955 (69 Stat. 367; 30 U.S.C. § 611-615 (1964)).

The Examiner's decision was rendered as a result of a hearing held on July 14, 1966, pursuant to a verified statement filed by David L. King, claiming surface rights to the lands in the claim contrary to or in conflict with the restrictions and reservations specified in section 4 of the act of July 23, 1955, *supra*. A surface rights determination proceeding was initiated at the request of the Forest Service, United States Department of Agriculture, pursuant to section 5(c) of the said act.

Henry W. Jones, having been duly qualified as a mining engineer, testified for the contestant. David L. King, the contestee, testified in his own behalf.

Mr. Jones examined the claim on several dates in August and November 1965. He was accompanied by Mr. King on his first examination. Mr. King then pointed out to him areas that should be sampled. Mr. Jones sampled seven locations on the claim, which were the only locations he observed were worthy of sampling. Several pans were taken from each of these areas. No gold was found in five of the samples and only two fine colors of gold were found in the other two samples, the colors being invisible to the naked eye. Sample No. 5 was taken from a place where Mr. King indicated he would work when they started mining again. After panning each of the six pans of material for sample No. 5, Mr. Jones saved the concentrates and put them in a jar. He sent them for assay. The assay report (Ex. 8) shows the weight of the sample as 7 grams, the free gold content of the sample by amalgamation as "Nil" and the gold content of amalgamation tailing by fire assay as "Nil."

Mr. Jones indicated that the ground had been extensively worked in the past and stated that the work had been done sometime prior to 1942. Mr. Jones expressed the opinion that a prudent man would not be justified in spending time, effort and money on the claim with the expectation of developing a paying mine. He also expressed the opinion that at one time there may have been values on the claim but these values have been mined out and they are no longer on the ground.

Mr. King testified that he visited the claim after Mr. Jones had done his sampling and that he mined approximately two cubic yards from the point where Mr. Jones had taken his sample No. 3, and that he recovered approximately $5 worth of gold. He stated that he is prepared to have the area re-tested at that particular site. He further stated that since 1955 he had sampled approximately 30 yards of material and that he had previously taken samples over the entire 160 acres and obtained values in excess of $1.50 a yard throughout the claim, although he did not measure the gold recovered from any of the samples. He stated that since he does not agree with Mr. Jones' sampling and his own sampling would not be accepted, there must be a joint sampling of the claim; he indicated that sample point No. 3 be re-sampled.

As a result, the Hearing Examiner ordered a joint sampling to be conducted at the point of sample No. 3 within a period of 60 days, that the sample be quartered and divided in a workmanlike manner and in conformity with the best mining operations, and that each party select his own assayer. The joint sampling was completed, and the Hearing Examiner received a report from the Abbott A. Hanks, Inc., laboratory on the sample submitted by the contestant. This report shows that the concentrates contained 0.0006 troy ounces of gold valued at $0.021. No report was received as to the sampling material taken by the contestee, Mr. King.

In his statement of reasons for appeal the appellant criticizes the sampling done on the claim by the contestant's mining engineer, contending, in substance, that the engineer's testimony to the effect that he (Mr. King) had pointed out places to sample was erroneous and that the engineer had retracted this statement on cross-examination. The appellant also contends that in the joint sampling of the claim the gold values were lost through a crack in the engineer's sluice box and that he (Mr. King) later returned to the claim and recovered one dollar in gold from the material that had been run through the sluice box.

These are merely bald allegations without any substantiation in the record. The engineer testified that he had sampled at the areas pointed out to him by Mr. King. There is nothing in the record to indicate that he retracted this testimony, nor is there any testimony by Mr. King, under oath, that contradicts the engineer's testimony. As for the alleged crack in the sluice box, there is nothing to indicate that Mr. King had brought this matter to the attention of the Hearing Examiner. Until he filed his statement of reasons for appeal, Mr. King had maintained complete silence as to the joint sampling. He did not even furnish an assay report for his portion of the joint sample, as was required in the Hearing Examiner's order for the joint sampling.

In a proceeding under section 5(c) of the Act of July 23, 1955, supra, to determine the rights of a mining claimant to the surface resources of his claim, it must be shown that there has been a valid discovery within the meaning of the mining laws made within the limits of his claim to prevent its being subject to the terms and limitations of section 4 of that act. United States v. Clarence E. Payne, 68 I.D. 250 (1961). This the claimants have failed to do.

The requirements for a discovery of valuable minerals are set forth in the so-called "prudent man" test enunciated in Castle v. Womble, 19 L.D. 455 (1894), approved by the Supreme Court in Chrisman v. Miller, 197 U.S. 313 (1905), and reaffirmed by the Supreme Court in Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963).

The burden of proof as to a discovery is first upon the Government to establish a prima facie case as to non-discovery and the burden then shifts to the contestee to establish the validity of his claim by a preponderance of the evidence. Foster v. Seaton, 271 F. 2d 836 (D. C. Cir. 1959).

We concur with the conclusion of the Hearing Examiner that there has not been a discovery of a valuable mineral deposit on the claim such as to satisfy the prudent man test in Castle v. Womble, supra. The Government established a prima facie case and the mining claimant failed to prove that there is a discovery on the claim by a preponderance of the evidence, as is required by Foster v. Seaton, supra.

The appellant has not shown that the claim has a present or prospective value for mining purposes. The more probative evidence shows the inescapable fact that there are no mineral values in the claim. The most that can be said for the claimant's evidence is that he may be willing to spend more time and money in exploration of the claim. However, the mere willingness of a mining claimant to expend further time and money in exploration is insufficient to establish the presence of a discovery on a mining claim. United States v. Robert Hight et al., A-30256 (April 21, 1965).

The Department has held that there is a distinct difference between exploration and discovery under the mining laws. Exploration work is that which is done prior to a discovery in an effort to determine whether the land contains valuable minerals. It is only when the exploratory work shows that minerals exist in such quantities and in such values that there is a reasonable prospect of success in developing a paying mine that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made. United States v. John L. Cooper et al., A-30267 (May 11, 1965); United States v. Clyde R. Altman and Charles M. Russell, 68 I.D. 235 (1961).

The evidence tends to indicate that the land within the claim may have supported a mining operation many years ago. However, there is no present existence of valuable minerals. Although a claim may have possibly been valuable for minerals in the past, there is no discovery when it is not shown as a present fact that the claim is valuable for minerals. United States v. David L. and Kathryn King, A-30217 (December 29, 1964).

The Hearing Examiner's decision of October 24, 1966 is correct, and it is hereby affirmed.

This decision does not extinguish the mining claim. The appellant is at liberty to carry on his prospecting and exploration program on the claim so long as he does not interfere with the rights of the United States to manage surface resources and to dispose of the vegetative resources as defined in section 4 of the act of July 23, 1955, supra.

Mr. David L. King is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

If an appeal is taken, the adverse party to be served is:

Regional Attorney
Office of the General Counsel
U. S. Department of Agriculture
630 Sansome Street, Room 860
San Francisco, California 94111

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures (2)

Distribution on page 5

DISTRIBUTION

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Regional Forester, Forest Service, U. S. Department of Agriculture
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Forest Service, U. S. Department of Agriculture, Division of Watershed Management (12)
Div. of L&M S&T (4)
Div. of L&M PM (2)
Adm. Asst., Hearings
Appeals List No. 1
OPD
Gower Federal Service
PLS
DDRF 1

Appeals Procedure: Generally--Dismissal 1840

An appeal to the Director, Bureau of Land Management, from a land office decision rejecting a mineral patent application for the reason that the application was not executed within the land district, will be dismissed where the appellant appears at the land office and executes and files a new application.

D. K. Cable, S 417 (July 19, 1967)

In reply refer to:
704
S 417

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

July 19, 1967

DECISION

D. K. Cable : Involving the Halkyard Nos. 1, 2, 3 and 4 placer mining claims, located in Secs. 28 and 29, T. 19 N., R. 9 E., M.D.M., Sierra County, California.

Appeal Dismissed

On April 7, 1967, Mr. D. K. Cable appealed from a Sacramento, California, land office decision, dated March 28, 1967, which rejected his above-identified mineral patent application for the reason that the application was not executed within the Sacramento Land District. 30 U.S.C. § 29 (1964); 43 CFR Subpart 3470. The decision also noted certain deficiencies in the application.

On April 13, 1967, Mr. Cable filed new mineral patent application, S 529, for the same claims in the Sacramento land office. This application was executed by him before a land office official. Thus the issue raised by the appeal has become moot, and the appeal is dismissed. Cf. Steve, Ltd., A-30746 (January 10, 1967); Nevada Fish and Game Commission, A-29658 (May 19, 1965). The case is, therefore, being returned to the Sacramento land office for further appropriate closing action.

Frances A. Patton
Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

DISTRIBUTION
Tognoni & Pugh, Attorneys for Appellant
Mr. D. K. Cable
Div. of L&M S&T (4)
Div. of L&M PM (2)
Gower Federal Service
OPD
Appeals List No. 1
PLS

appeal to Sec
affirmed A-30872
2-21-68

Hearings Procedures: Government Contests 1852.2

It is proper for the manager of a land office to deny acceptance of an answer to a contest complaint which is not filed within the time allowed by the regulations.

There is no authority for the Director to waive the regulations in his exercise of supervisory authority so as to accept a late answer to a contest complaint.

United States v. Harold H. Hunter, Contest 130 (Sacramento) (July 20, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 AUG 3 AM 10 00

In reply refer to:
704
Contest 130 (Sacramento)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

July 20, 1967

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America, Contestant v. Harold H. Hunter, Contestee	:	Involving the Pine Needle #2 placer mining claim, situated in sections 7 and 18, T. 19 N., R. 9 E., M.D.M., Sierra County, California, within Tahoe National Forest.

Decision Affirmed

Mr. Harold H. Hunter has appealed from a decision of our Sacramento land office dated February 3, 1967, which denied his request for acceptance of a delayed answer to a contest complaint.

The record shows that a contest complaint charging, in essence, that a valid discovery under the mining laws does not exist within the limits of Pine Needle #2 placer mining claim in sections 7 and 18, T. 19 N., R. 9 E., M.D.M., was served on Harold H. Hunter on November 17, 1966. The complaint stated also that unless the contestee files an answer within 30 days the allegations of the complaint would be taken as admitted and the case decided without a hearing. As no answer to the complaint was filed, the land office issued its decision dated January 9, 1967, stating that failure of the contestee to file an answer is taken as admission of the truth of the charges in the complaint, and declaring the Pine Needle #2 placer mining claim null and void. On January 25, 1967, Mr. Hunter filed a delayed answer to the complaint, together with a statement that his failure to respond timely to the complaint was caused by his lack of understanding of the contest procedures. He requested that the delayed answer be accepted. The land office denied this request by its decision dated February 3, 1967, from which this appeal was taken.

In his appeal Mr. Hunter admits lack of authority in the land office manager to accept his delayed answer and reiterates that his failure to respond timely to the contest complaint was because of his ignorance and misunderstanding of the proceedings. He asks that the Director exercise supervisory authority and accept the delayed answer.

The Departmental regulations under which the contest in question was commenced provide that:

> The Government may initiate contests for any cause affecting the legality or validity of any entry or settlement or mining claim. 43 CFR 1852.2-1.
>
> Within 30 days after service of the complaint . . ., the contestee must file in the office where the contest is pending an answer

> specifically meeting and responding to the allegations of the complaint, ... 43 CFR 1852.1-6.
>
> If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the Manager will decide the case without a hearing. 43 CFR 1852.1-7(a).

When the contestee failed to file an answer to the complaint within the time allowed in the complaint, he was clearly in default under the regulations of this Department, and it was proper for the land office to declare the mining claim null and void in its decision of January 9, 1967.

The language of the pertinent regulation quoted above is mandatory that if an answer is not filed timely "the allegations of the complaint will be taken as admitted by the contestee and the Manager will decide the case without a hearing" (43 CFR 1852.1-7(a)). This rule has been enforced strictly from its inception without deviation. See United States v. J. Hubert Smith, 67 I.D. 311 (1960); United States v. Raymer Garnett, et al., A-28545 (January 31, 1961); United States v. Henry Gilligan, et al., A-28857 (February 19, 1962); United States v. Gifford Allen, et al., A-28718 (July 26, 1962); United States v. Ruben J. Garcia, et al., A-28889 (July 30, 1962); United States v. Carl D. Jensen, A-28789 (August 6, 1962); United States v. Bradley-Turner Mines, Inc., A-29813 (November 19, 1963).

In view of the consistent rulings of the Department and the appellant's failure to file a timely answer, the land office was correct in rejecting the appellant's belated answer filed January 25, 1967. In United States v. J. Hubert Smith, supra, the Department held that the Secretary could not waive the regulation providing for a default decision against a contestee if he fails to answer timely, citing Chapman v. Sheridan-Wyoming Coal Company, 338 U.S. 621 (1950), and McKay v. Wahlenmaier, 226 F. 2d 35 (D.C. Cir. 1955). The Smith case was a Government contest brought at the request of the Forest Service, United States Department of Agriculture, even as this contest stems from a similar request by the Forest Service.

The decision appealed from is affirmed.

Mr. Harold H. Hunter is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D.C. 20240. The filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

Newton Frishberg
Chief, Office of Appeals
and Hearings

Enclosures 2
Dist. on page 3

DISTRIBUTION:
H. S. Gilmore, Attorney for Appellant (Certified Mail)
Harold H. Hunter
Hon. Harold T. (Bizz) Johnson, House of Representatives
Regional Forester (San Francisco)
Forest Service, USDA (Div Watershed Mgmnt) (12)
Div L&M S&T (4)
Div L&M PM (2)
Cower Federal Service
DEH

appeal to Sec
affirmed A-30880 2-14-68

Mining Claims: Withdrawn Land: Reclamation Withdrawals 3400.1
3400.4
Power Sites (P.L. 359) 3530

Land that is subject to a first form reclamation withdrawal is not open to mineral entry, and any mineral locations made on such land during the pendency of the withdrawal are null and void and can confer no rights upon the locators.

Lands which are under examination and survey by a prospective licensee of the Federal Power Commission pursuant to section 2(a) of the act of August 11, 1955, are not open to location under the mining laws, and mining locations made on such lands while they are not open to location are properly held null and void.

A. L. Snyder, et al., Sacramento 080209 etc. (August 4, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 AUG 11 AM 10 00

In reply refer to:
704
Sacramento 080209
080210
080211
080212

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

August 4, 1967

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

A. L. Snyder :
Myron C. Smith : Mining Claims
Earl M. Oglevie :
Clarence Black :

Decision Affirmed, as Modified

Messrs. A. L. Snyder, Myron C. Smith, Earl M. Oglevie, and Clarence Black have appealed from a decision of our Sacramento land office dated July 22, 1966, which declared their Feather Lime Nos. 2, 3, 4, and 5 lode mining claims null and void *ab initio* for the reason that the land was withdrawn from mining location pursuant to Section 24 of the Federal Power Act (16 U.S.C. § 818 (1964)), and falls within the purview of the third proviso of Section 2 of the Act of August 11, 1955 (Public Law 359, 84th Congress; 30 U.S.C. § 621 (1964)). 1/

The appellants contend the land was not withdrawn for power purposes on August 11, 1955, the date of Public Law 359, so that the third proviso of section 2 of that Act is inapplicable. They contend the proviso does not have prospective application but is designed only to protect licenses and permits outstanding on August 11, 1955, and argue that the lands were open to mining location under the general language of Public Law 359 when their claims were located.

The location notices show that the Feather Lime Nos. 2, 3, 4, and 5 lode mining claims were located September 2, 1961, for land in the NE¼ section 2, T. 21 N., R. 6 E., M.D.M., California.

The records show that the said NE¼ section 2 is within the Plumas National Forest and was withdrawn on May 25, 1953, from location, entry, or other disposal pursuant to Section 24, Federal Power Act, *supra*, by filing of an application for Power Project No. 2134. A preliminary permit for this Power Project No. 2134 was issued February 1, 1957, for a 3-year period. Application for a license was filed December 22, 1959, by the holders of the preliminary permit.

1/ The land office decision inadvertently referred to the mining claims as "Feather Line Nos. 2, 3, 4, and 5."

Section 2 of the Act of August 11, 1955, supra, opened to entry for location and patent, under the mining laws of the United States, public lands that had theretofore been withdrawn or would thereafter be withdrawn for power development or power sites, except:

> ". . . lands (1) which are included in any project operating or being constructed under a license or permit issued under the Federal Power Act or other Act of Congress, or (2) which are under examination and survey by a prospective licensee of the Federal Power Commission, if such prospective licensee holds an uncanceled preliminary permit issued under the Federal Power Act authorizing him to conduct such examination and survey with respect to such lands. . . ."

The subject lands fall within the purview of the statute above-cited since they are under examination and survey by a prospective licensee which holds an uncanceled preliminary permit issued under the Federal Power Act, supra.

Lands described in a pending application for a license to construct a power project are not open to mineral entry under section 2 of the Act of August 11, 1955, supra, if the application for the license was filed by the holder of a preliminary permit before the expiration of the period for which the preliminary permit was granted. In such a case, it cannot be said that the permit was cancelled. Rather, the priority under the permit was preserved by the timely filing of the application for the license, and the applicant is a "prospective licensee of the Federal Power Commission" within the meaning of the Act of August 11, 1955, supra. Francis N. Dloughy, A-28597 (May 18, 1962); C. A. Anderson, A-29999 (March 23, 1964). Hence, the land in question was withdrawn from mineral entry when location of the subject claims was attempted. The applicants are in error when they contend the land was not withdrawn for power purposes on August 11, 1955.

The record further shows that all section 2, T. 21 N., R. 6 E., M.D.M., was withdrawn in the first form for reclamation by Departmental Order dated February 27, 1952. This order was revoked as to the said section 2 by Public Land Order No. 3187 dated July 31, 1963, and the land was opened to location under the United States mining laws beginning at 10 a.m., January 30, 1964. Land that is subject to a first form reclamation withdrawal is not open to mineral entry and any mineral location made on such land during the time the land remains withdrawn is null and void and can confer no rights upon the locators or claimants. Robert K. Foster et al., A-29857 (June 15, 1964), affirmed in Foster v. Jensen, Civil No. 64-1110-WM, in the United States District Court for the Southern District of California (September 13, 1966).

Thus, on September 2, 1961, when the location of the Feather Lime Nos. 2, 3, 4, and 5 lode mining claims was attempted, the land involved was withdrawn from mining location by the first form reclamation withdrawal as well as by Power Project No. 2134. It was thus correct for the land office to declare the Feather Lime Nos. 2, 3, 4, and 5 lode mining claims null and void ab initio.

The decision appealed from is affirmed, as modified herein.

Messrs. A. L. Snyder, Myron C. Smith, Earl M. Oglevie and Clarence Black are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers all 4 mining claims adversely affected by this decision the total filing fee will be $20. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellants will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Frances A. Patton

Acting Chief,
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
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Myron C. Smith
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Earl Oglevie
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FS, USDA, Washington, D. C.
    Div Watershed Mgmnt (12)
Div L&M S&T (4)
Div L&M PM (2)
OPD
Gower Federal Service
Appeals List No. 1
DEH

appealed to the Sec.
affirmed A-30884 - 3-29-68

Mining Claims: Determination of Validity 3400.1

Although the presence of a mining claimant on mining claims when they are being examined by a government mineral examiner may be desirable, it is not a legal requirement, as it is up to the mining claimant to prove the validity of his claim by a preponderance of the evidence.

The value which sustains a discovery must be such that a profitable venture may reasonably be expected to result from actual mining operations under proper management.

Mining Claims: Discovery 3413

The discovery of a valuable mineral upon a mining claim at some time in the past, even though it may have been an economic success, may be lost for many reasons, such as exhaustion of the valuable minerals, or a drastic reduction in the market price of the mineral may render the deposit unworthy of further development.

It is necessary to consider mineral values in order to determine whether minerals have been exposed in such quantity and value that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine.

<ins>United States</ins> v. <ins>Esther R. Smith</ins>, Sacramento 066004-E (August 11, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
67 AUG 17 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In Reply Refer to:
704
Sacramento 066004-E

August 11, 1967

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America	:	Involving the Rough and Ready
	:	Nos. 4 and 5, Star Nos. 1, 2, 3
v.	:	and 4, Blue Gravel No. 9 Fractional
	:	and Blue Gravel Nos. 9 and 10 minin
Esther R. Smith,	:	claims, located in Secs. 30 and 31,
Mining Claimant	:	T. 17 N., R. 2 E., H.M., California

Decision Affirmed

Mrs. Esther R. Smith has appealed from a Hearing Examiner's decision, dated November 4, 1966, which held that none of the above-named mining claims had been validated by discovery of valuable mineral deposits within the meaning of the mining laws and that the United States thus has the right, prior to issuance of patent to these mining claims, to manage and dispose of the vegetative surface resources and to manage other surface resources thereof within the limitations and restrictions of Section 4 of the act of July 23, 1955 (69 Stat. 367; 30 U.S.C. § 611-615 (1964)).

The Examiner's decision was rendered as a result of a hearing held in Eureka, California, on June 15, 1966, pursuant to a verified statement filed by Esther R. Smith claiming surface rights to the lands in the nine claims contrary to or in conflict with the restrictions and reservations specified in section 4 of the act of July 23, 1955, supra. A surface rights determination proceeding was initiated on behalf of the Forest Service, United States Department of Agriculture, pursuant to section 5(c) of the said act.

Minter E. Harris, being duly qualified as a mining engineer, testified for the Government that he examined the claims on six occasions in March and July 1964, in March 1965 and in May 1966. He said that there are indications of chromite on the claims and that an ancient river channel points to the possibility of placer gold. He observed workings which were caved and flooded, and pits and dozer cuts which were overgrown with trees and brush. By panning he estimated the gold content in placer gravels to be less than five cents a cubic yard. He took six samples from serpentine rock. One sample from the Star No. 4 assayed at $2.80 per ton in gold; one from the Star No. 3 assayed at $2.10 in gold; and four samples from the Star No. 1, which were assayed for chromic oxide, were negative (Ex. 6).

On cross-examination Harris testified that the chromite pit on the Star No. 1 claim had been worked out, stating "there's absolutely no chromite left. It's about the most hopeless piece of property as having anything in sight you could look at" (Tr. 44).

Ed Carlson, a miner and driller, testified for the mining claimant that he had a sublease on the claims in 1945-1946. He sunk a 90-foot shaft on the Star No. 2 and later abandoned it. He also drilled several churn drill holes to varying depths but would not disclose what minerals he found in the holes. He removed fourteen tons of float material containing chromite from the vicinity of the 90-foot shaft and sold the material to the United States General Services Administration stockpile at Grants Pass, Oregon. He further testified that he had worked for the nearby Tysson Mine, which was a substantial producer of chromite, but this mine is no longer in operation because there is "no value for chromium any more. Thirty-seven dollars /per ton/. You can't put it in a bunker for that." (Tr. 75-76). On cross-examination he said that the fourteen tons of chrome removed from the property were sold for $115.00 per ton, but the government had discontinued its chrome purchasing program in 1957.

Mrs. Esther R. Smith, the mining claimant, testified that some chrome float had been sold to Mr. Carlson. She introduced copies of contracts (Ex. C) for the purchase of chrome ore by the General Services Administration. One contract in April 1957 was for 7.4944 tons of ore for a price of $689.63; the other dated in May 1957 was for 5.4187 tons at a price of $642.12. She also identified copies of receipts showing shipments of 10,180 pounds and 2,740 pounds of chrome ore in June and July 1957, but the values of the shipments were not shown. On cross-examination, when asked why any more ore had not been taken out, she answered "Well, you see, the price is off on chrome." (Tr. 107). She further stated that gold had been recovered from a swamp on the Star No. 3 and Blue Gravel Fractional claims. The gold was recovered from bedrock, which formed a natural sluice box. The bedrock was cleaned up during the spring of each year.

On cross-examination Mrs. Smith stated that the only chrome ore removed from the claims was that removed by Mr. Carlson and Mr. Wood, lessees. She had no idea how much chrome ore might be remaining on any of the claims but thought that there were probably a number of tons left. She admitted that the amount of gold actually recovered from the claims would be very little. She identified an assay report (Ex. E) of a sample taken from the above-mentioned swamp. The report shows 3.24 troy ounces of gold having a value of $113.40 per ton.

In a proceeding under section 5(c) of the act of July 23, 1955, supra, to determine the rights of a mining claimant to the surface resources of his claim, it must be shown that there has been a valid discovery within the meaning of the mining laws made within the limits of his claim to prevent its being subject to the terms and limitations of section 4 of that act. United States v. Clarence E. Payne, 68 I.D. 250 (1961).

In his decision the Hearing Examiner correctly set out the mining laws, including principles as enumciated by the Department and the courts which govern in the determination of validity or invalidity of mining claims with respect to the facts which were developed in this proceeding. He mentioned that the discovery of a valuable mineral deposit is essential to a valid claim. He mentioned the elements necessary to establish a valid discovery on a lode mining claim as set forth in *Jefferson-Montana Copper Mines Company*, 41 L.D. 320 (1912); that it is not until minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine, that the requirements of the law have been met, citing *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334 (1963), and other cases; that the discovery of a valuable mineral upon a mining claim at some time in the past, even though it may have been an economic success, may be lost to the claimant for many reasons, such as exhausting the valuable minerals therein, citing *United States* v. *Bee Lambert Barnes*, A-30506 (March 28, 1966); and that a drastic reduction in the market price of the mineral may render the mineral deposit unworthy of development, citing *United States* v. *Theodore R. Jenkins*, A-30409 (March 1, 1966).

In her statement of reasons for appeal, the appellant asserts that a discovery of valuable minerals has been made on the claims, contending that the record indicates that the claims produced valuable minerals for years in quantities sufficient to sustain persons working the claims. On the contrary, the record does not sustain this contention. The appellant herself admitted that the amount of gold actually recovered from the claims would be very little. Furthermore, the evidence indicates that only a few relatively small shipments of chrome float were sold to the United States Government in 1957 for stockpiling purposes, but that the price has dropped considerably since then, and in the words of one of the appellant's witnesses,"You can't put it in a bunker for that." Even if we were to assume that these claims may have constituted a valuable mine at one time, the evidence in the record clearly points to the fact that there are no valuable minerals on the claims at the present time, and hence, no present discoveries. See *United States* v. *Bee Lambert Barnes*, *supra*; *United States* v. *Theodore R. Jenkins*, *supra*; *United States* v. *David L. and Kathryn King*, A-30217 (December 29, 1964).

The burden of proof as to discovery is first upon the Government to establish a *prima facie* case as to non-discovery, and the burden then shifts to the contestee to establish the validity of his claim by a preponderance of the evidence. *Foster* v. *Seaton*, 271 F. 2d 836 (D.C. Cir. 1959). We find that the Government established a *prima facie* case in this proceeding and that the mining claimant failed to prove discovery on any of the claims by a preponderance of the evidence.

The appellant further alleges that she was not notified of the intended inspecting and testing of her claims by the government mineral examiner and she was thus not given an opportunity to observe the testing or to show the examiner mineral deposits on the claims. Although the presence of a mining claimant on mining claims when they are being examined by a government mineral examiner may be desirable, it is not a legal requirement. As hereinabove stated, it is up to the mining claimant to prove the validity of his claim by a preponderance of the evidence. It is only necessary for the Government to make a prima facie case. Cf. United States v. Fisher Contracting Company, John T. Katsenes, Intervenor, A-28779 (August 21, 1962).

The appellant also contends that the Examiner's decision is in error in using the values assumed from the testimony of witnesses as a measure of a valuable discovery. It is always necessary to consider mineral values in order to determine whether minerals have been exposed in such quantity and of such value that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Castle v. Womble, 19 L.D. 455 (1894), approved by the Supreme Court in Chrisman v. Miller, 197 U.S. 313 (1905), and in Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963).

In an effort to support her last contention, the appellant quotes excerpts taken from Chrisman v. Miller, supra; Migeon v. Montana Cent. Ry. Co., 77 F. 249 (1896); and North Noonday Mining Co. v. Orient Mining Co., 1 F. 522 (1880). The quoted excerpts are cited by appellant as authority for the proposition that mining locations may be made if one has found some mineral values, whether the rock assays high or low. A careful study of these cases discloses that the excerpts are taken out of context and do not represent the courts' holdings. The mining laws do not require that the values shown must be such as will demonstrate that a claim can be worked at a profit, or that it is more probable than not that a profitable mining operation can be brought about, before a discovery may be claimed, United States v. C. F. Smith, 66 I.D. 169, 172 (1959). Nevertheless, it has been held that the value which sustains a discovery must be such that a profitable venture may reasonably be expected to result from actual mining operations under proper management. United States v. Santiam Copper Mines, Inc., A-28272 (June 27, 1960)

The Hearing Examiner's decision of November 4, 1966 is correct, and it is hereby affirmed.

This decision does not extinguish the mining claims. The appellant is at liberty to carry on a prospecting and exploration program on the claims so long as she does not interfere with the rights of the United States to manage the surface resources and to dispose of the vegetative resources as defined in section 4 of the act of July 23, 1955, supra.

Mrs. Esther R. Smith is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each claim included in the appeal If the appeal covers all nine claims adversely affected by this decision the total filing fee will be $45. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

If an appeal is taken, the adverse party to be served is:

Mr. C. F. Lawrence
Office of the General Counsel
United States Department of Agriculture
630 Sansome Street, Room 860
San Francisco, California 94111

Newton Frishberg
Chief, Office of Appeals and Hearings

Enclosures 2

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Regional Forester, Forest Service, United States Department of Agriculture, San Francisoo, California
Office of the General Counsel, United States Department of Agriculture, Division of Lands and Forestry, Washington, D. C.
Forest Service, United States Department of Agriculture, Division of Watershed Management, Washington, D. C. (12)
Office of Hearing Examiners, Sacramento, California
Administrative Assistant, Hearings
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Gower Federal Service
Appeals List No. 1
PLS

Mining Claims: Lands Subject to 3400

After a classification under the Recreation and Public Purposes Act (43 U.S.C. § 869 (1964)) has been revoked and the lands are opened to location and entry under the United States mining laws, it is not proper to declare mining claims located thereafter as null and void *ab initio* for reason that the lands are not open to location.

Elizabeth Laue, Riverside 252 (August 21, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 SEP 12 PM 2 55

In reply refer to:
704
Riverside 252

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

August 21, 1967

DECISION

Elizabeth Laue : Lode Mining Claim
:
:

Decision Vacated

Mrs. Elizabeth Laue has appealed from a decision of our Riverside district and land office dated November 17, 1966, which declared her Betty Laue lode mining claim null and void as to lands within lot 54 section 22, T. 10 N., R. 1 E., S.B.M., San Bernardino County, California, for the reason that the said lot 54 (formerly SW¼ lot 14) had been classified for lease or sale under the Recreation and Public Purposes Act (43 U.S.C. § 869 (1964)), and so was segregated from location under the United States mining laws.

On appeal Mrs. Laue contends essentially that the land office records do not show the subject lands to be withdrawn from mining location.

Review of the records show that the Betty Laue lode mining claim was located April 13, 1966, in the SE¼ section 22, NE¼ section 27, T. 10 N., R. 1 E., S.B.M. That portion of the mining claim in section 22 lies within the SW¼ lot 54 for which a classification under the Recreation and Public Purposes Act, supra, was revoked, and the land was opened to mining location on and after June 22, 1964. 1/

Accordingly, it was error for the district and land office to hold the Betty Laue lode mining claim null and void ab initio on the basis that the land was not open to mining location. The decision below is vacated.

This finding is not a determination that the Betty Laue lode mining claim is valid under the United States mining laws.

The case file is returned to the Riverside district and land office for further appropriate action.

Newton Frishberg
Chief, Office of Appeals and Hearings

Dist. on page 2

1/ District and land office Notice issued June 12, 1964; 43 CFR 2232.1-4(b).

DISTRIBUTION:
Robert Dean Upp, Attorney for Appellant
Mrs. Elizabeth Laue
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Div L&M PM (2)
OPD
Gower Federal Service
Appeals List No. 1
DEH

appealed to the Sec.
affirmed A-30889 2-28-68

Mining Claims: Lands Subject to 3400

It is proper to declare mining locations null and void *ab initio* as to lands classified for disposal, and under lease, pursuant to the Recreation and Public Purposes Act (43 U.S.C. §§ 869 (1964)).

C. V. Armstrong, et al., Riverside 249, etc. (August 21, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 SEP 12 PM 2 56

In reply refer to:
704
Riverside 249, 250, 251

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

August 21, 1967

Certified Mail
Return Receipt Requested

DECISION

C. V. Armstrong :
William Roberts : Lode Mining Claims
Harold S. Cook, Jr. :

Decisions Affirmed, as Modified

Messrs. C. V. Armstrong, William Roberts, and Harold S. Cook, Jr., have individually appealed from separate decisions of our Riverside district and land office dated November 17 or 22, 1967, which declared the Armstrong, Roberts, and Cook lode mining claims null and void *ab initio* insofar as they include lands within W½ lot 14 (now lots 53, 54), W½ lot 34 (now lot 46), or N½ lot 41 (now lot 51) section 22, T. 10 N., R. 1 E., S.B.M., San Bernardino County, California, for the reason that these lands are not open to mining location because they were classified for disposal only under the Recreation and Public Purposes Act (43 U.S.C. § 869 (1964)) by an order dated October 24, 1962 (Riverside 02287), and are presently under lease and/or under application for purchase under the Recreation and Public Purposes Act by San Bernardino County. Because the appellants submitted identical appeals, they have been consolidated for the purposes of this decision.

The appellants contend that the classification for Recreation and Public Purposes is contrary to the public interest because mining is the major resource activity in the area, that the land office records did not reflect the withdrawal of the subject lands from mining location when the subject lode mining claims were located, that the land office did not follow the directions set forth in 43 CFR 2410.1-4(a)(2) in the classification of the land nor of 43 CFR 2243.2-6(c) as to posting of the order, and that the employees of the Bureau of Land Management gave erroneous information as to the availability of the land.

The record discloses that the Roberts lode mining claim was located February 20, 1966, in W½ lot 14 (now lot 53, SW½ lot 54), lot 40, lot 41 (now lots 51 and 52) section 22, and NE¼ section 27, T. 10 N., R. 1 E., S.B.M., San Bernardino County, California. The Cook lode mining claim was located February 20, 1966, in lot 14 (now lots 53 and 54) section 22, and W½SW½ section 23, T. 10 N., R. 1 E., S.B.M. The Armstrong lode mining claim was located February 22, 1966, in N½ lot 14 (now lot 53, NE¼ lot 54), lot 34 (now lots 45 and 46) section 22, and NW¼SW¼ section 23, T. 10 N., R. 1 E., S.B.M. A supplemental plat of survey for section 22, T. 10 N., R. 1 E., S.B.M., was approved August 24, 1966, delineating lot 45 in lieu of E½ lot 34, lot 46 in lieu of W½ lot 34, lot 51 in lieu of N½ lot 41, lot 52 in lieu of S½ lot 41, lot 53 in lieu of NW¼ lot 14, lot 54 in lieu of SW¼, E½ lot 14. A classification order (Riverside 02287) dated October 24, 1962, classified, inter alia, lots 14, 34, and 41, section 22, T. 10 N., R. 1 E., S.B.M., as proper for disposal only under the Recreation and Public Purposes Act, supra. A restoration from this classification order, effective June 22, 1964, opened the E½, SW¼ lot 14 (now lot 54), E½ lot 34 (now lot 45), and S½ lot 41 (now lot 52) in section 22, T. 10 N., R. 1 E., to mining location. The NW¼ lot 14 (now lot 53), W½ lot 34 (now lot 46), and N½ lot 41 (now lot 51), inter alia, are included in recreation lease Riverside 03436, issued to San Bernardino County, effective August 1, 1963, and amended June 12, 1964. These lands are also included in the application to purchase filed by the County.

The appellants are mistaken in applying 43 CFR 2243.2-6(c) and 2410.1-4(a)(2) to the existing classification for recreation and public purposes. These regulations relate solely to the classification of land for sale under the Public Land Sale Act of 1964 (43 U.S.C. §§ 1421-1427 (1964)), and to the Classification and Multiple Use Act of 1964 (43 U.S.C. §§ 1411-1418 (1964)), respectively. Neither of these acts is germane to a recreation and public purposes classification outstanding when these statutes became law.

The Recreation and Public Purposes Act, supra, provides, inter alia, that lands classified for disposition under the act may not be appropriated under any other public land law unless the Secretary of the Interior revises the classification specifically to provide for such disposition, and that patents and leases issued under the act shall reserve to the United States all mineral deposits in the lands together with the right to mine and remove such deposits under applicable laws and regulations to be established by the Secretary. Such regulations have not yet been promulgated by the Secretary.

Notices of the location of mining claims on lands covered by a lease issued under the Recreation and Public Purposes Act are properly rejected because such lands are not subject to mining location until the Secretary of the Interior has adopted regulations permitting the disposition of minerals under the mining laws on such lands. Carl F. Murray and Clinton D. Coker, 67 I.D. 132 (1960).

As the Armstrong lode mining claim invaded land in lots 46 and 53, the Roberts lode mining claim invaded land in lots 51 and 53, and the Cook lode mining claim invaded land in lot 53, section 22, T. 10 N., R. 1 E., S.B.M., within recreation and public purposes lease Riverside 03436, each of these mining claims was invalid as to such lands ab initio.

If erroneous status information relating to these lands was given by the district and land office employees, it is to be regretted, but the Department has consistently held that erroneous advice given by personnel of the Bureau of Land Management cannot confer a right not authorized by law. Wayne E. Bright, A-30475 (February 4, 1966). See also United States v. Richard Deane Lance, 73 I.D. 218 (1966).

The decisions appealed from are affirmed with modification to declare the Roberts lode mining claim null and void *ab initio* only as to lands lying within lots 51 and 53, and the Cook lode mining claim null and void *ab initio* only as to lands lying within lot 53, section 22, T. 10 N., R. 1 E., S.B.M., for the reasons above discussed.

No determination as to the validity of the Armstrong, Roberts or Cook lode mining claims for the remaining lands embraced therein is made by this decision.

Messrs. C. V. Armstrong, William Roberts, and Harold S. Cook, Jr., are each allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers all three mining claims adversely affected by this decision the total filing fee will be $15. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION
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William Roberts
Harold S. Cook, Jr.
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OPD
Gower Federal Service
Appeals List No. 1
DEH

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D. C. 20240

In Reply Refer to:
704
S-588

Prospecting Permit

AUG 24 1967

DECISION

Raymond A. Naylor

Withdrawal of Appeal ☒
Filed: **August 21, 1967**

Relinquishment of
Interest in Case ☐
Filed:

Appeal Dismissed

In view of the withdrawal or relinquishment noted above, the appeal to the Director, Bureau of Land Management, in this matter is dismissed. The case **is being** returned with a copy of this decision to our State Director for further appropriate action.

Frances A. Patton
Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

cc: H. S. Gilmore, Agent for Appellant
Raymond A. Naylor
SD (California)
LO (Sacramento)

48673-64

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1967 AUG 28 AM 10 00

Appealed to Sec
affirmed A-30894

Cy in case
6-11-68

Sodium Leases and Permits: Generally 3150

It is proper to reject an application for a sodium prospecting permit on lands within a national forest where the Forest Service withholds its consent to issuance of such permit because it would probably interfere with long-range recreational development plans for the area.

Gene R. Blaney, S 215 (September 20, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 SEP 28 PM 2 55

In reply refer to:
704
S 215

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

September 20, 1967

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Gene R. Blaney : Sodium
:

Decision Affirmed

Dr. Gene R. Blaney has appealed from a decision of our Sacramento land office dated June 2, 1967, which rejected his application S 215 for a sodium prospecting permit for the reason that the Forest Service has withheld its consent to issuance of the permit because the area has been dedicated to public recreation.

The application sought a sodium permit on sections 9, 15, 16, and 22, T. 17 S., R. 31 E., M.D.M., California, withdrawn for the Sierra Forest Reserve by Presidential Proclamation dated February 14, 1893, and made part of the Sierra National Forest by Executive Order of July 1, 1908. Modification of the boundaries of Sequoia National Park by the Act of July 3, 1926 (44 Stat. 818), placed the northern portion of section 9, T. 17 S., R. 31 E., M.D.M., in the Roosevelt-Sequoia National Park, and the remainder of the land described in the subject application in the Sequoia National Game Refuge within the Sequoia National Forest. Except for the lands in section 9 within Sequoia National Park, to which the Mineral Leasing Act of 1920 does not apply, none of the remaining lands sought are withdrawn from operation of the Mineral Leasing Act of 1920 (30 U.S.C. § § 181 et seq. (1964)), except that no prospecting permit or lease may be issued for lands in the national forest without consent of the Forest Service, United States Department of Agriculture (43 CFR 3151.4).

The appellant contends essentially that the lands which he seeks have not been withdrawn from mining and that under the principles of multiple use he should be granted a permit. He argues that the Forest Service does not have authority to deny him the right to prospect for minerals in the land under discussion.

As the chief argument of the appellant is premised on the mining laws of the United States, not on the Mineral Leasing Act of 1920, supra, it is not pertinent to the present situation. Minerals such as sodium which are subject to disposition under the Mineral Leasing Act of 1920, supra, have not been subject to the United States mining laws since enactment of the leasing act. Prospecting for minerals subject to location under the mining laws is different from prospecting under a permit issued pursuant to an application under the Mineral Leasing Act. See Arthur L. Rankin, 73 I.D. 305 (1966).

The leasing for or permitting of prospecting for sodium as well as for other minerals under the Mineral Leasing Act in public lands is discretionary with the Department of the Interior. The Department has long held to the policy that if use of land for mineral leasing activities would interfere with the use for which the land is reserved, it is proper to reject the application for such land. Thus, where the land applied for is administered by another agency and that agency objects to issuance of a sodium prospecting permit on the ground that the prospecting would interfere with the purposes for which the lands are being administered, this Department has refused to issue such a permit. This has been especially true with respect to lands administered by the Forest Service. See Richfield Oil Co., et al., 66 I.D. 106 (1959) and cases cited.

Although the Secretary has the authority to issue a sodium prospecting permit, he is not required to do so when refusal is based on sound exercise of administrative discretion. That the Secretary has discretionary authority to refuse to issue such a permit is well established. Joseph I. O'Neill, Jr., A-30488 (Supp.) (December 7, 1966).

The Forest Service has reported it has already dedicated the area (for which this application was filed) to the satisfaction of needs for public recreation, and presently is working with a potential concessionaire to formulate an overall recreational development program which may culminate in a 30-year term permit and which surely will involve the expenditure of more than $25 million of private funds as well as some Federal funds.

From the record it appears that withholding of its consent to issuance of this sodium prospecting permit is not an arbitrary or capricious abuse of administrative discretion by the Forest Service, but rather is consonant with the best public interests.

Dr. Gene R. Blaney is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Frances A. Patton
Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2
Dist. on page 3

DISTRIBUTION:
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Gower Federal Service
Appeals List No. 1
DEH

Appealed to Sec
affirmed A-30917 11-29-68

Multiple Mineral Development: Act of July 23, 1955 3510

After a hearing on a verified statement filed pursuant to a proceeding under section 5(c) of the Act of July 23, 1955, mining claims located prior to July 23, 1955, are properly declared to be subject to the terms and limitations of section 4 of the act when the claimant failed to show that there was a valid discovery within the meaning of the mining laws made within the limits of the claims prior to the date of the act.

Mining Claims: Discovery 3413

The mere willingness of a mining claimant to expend further time and money in prospecting and exploration work is not sufficient to establish that a discovery exists on a mining claim.

Although a mining claim may possibly have been valuable for minerals in the past, there is no discovery when it is not shown as a present fact that the claim is valuable for minerals.

United States v. A. Speckert, Contest No. 060277-T (Sacramento) .
(October 10, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 OCT 20 AM 10 00

In reply refer to:
Contest 060277-T
(Sacramento)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

October 10, 1967

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America,
Contestant
v.
A. Speckert,
Contestee

Involving surface rights to the Sunset, Sunset Nos. 1 to 13, inclusive, and Alpha lode mining claims, situate in sections 2, 3, 11, T. 26 N., R. 8 E., and sections 27, 34, and 35, T. 27 N., R. 8 E., M.D.M., Plumas County, California, within the boundaries of Plumas National Forest.

Decision Affirmed
Request for Rehearing Denied

Mr. A. Speckert has appealed from a decision of a Hearing Examiner dated January 25, 1967, which declared the Sunset, Sunset Nos. 1 to 13, inclusive, and Alpha lode mining claims to be subject to the provisions of section 4 of the Act of July 23, 1955 (30 U.S.C. § 612 (1964)).

Section 4 of the Act of July 23, 1955, *supra*, provides, *inter alia*, that rights to mining claims located after the date of its enactment on public lands shall be subject, prior to the issuance of patent, to the right of the United States to manage and dispose of the vegetative surface resources and to manage other surface resources, except mineral deposits subject to location under the mining laws. Section 5 of the act (30 U.S.C. § 613 (1964)) provides a means by which surface rights in mining claims can be determined as between the United States and the mining claimants.

The record shows that all the claims were located before July 23, 1955: Sunset and Sunset Nos. 1, 2, and 3 in 1930; Sunset No. 4 in 1944; Sunset Nos. 5, 6, 7, and 8 in 1952; Alpha in 1953; Sunset Nos. 9, 10, 11, 12, and 13 in 1954. Each location notice names manganese as the mineral claimed. The appellant purchased the claims as evidenced by a quitclaim deed dated December 22, 1960.

In 1960, the land office manager, at the request of the Forest Service, United States Department of Agriculture, published a notice including the lands above-described in accordance with section 5 of the Act of July 23, 1955, supra. Within the required time, A. Speckert, alleging that he was the sole owner, filed a verified statement setting forth certain information regarding the subject mining claims.

A hearing was held at Marysville, California, on November 7 and 8, 1966, to determine the surface rights on the claims in a proceeding initiated by the Forest Service pursuant to section 5 of the act, supra. The issues at the hearing were whether or not a discovery of a valuable mineral deposit has been made within the limits of any of the claims, whether or not the boundaries of the claims are distinctly marked on the ground, whether or not a verified statement was filed for any of the claims by a person authorized under the Act within 150 days from first date of publication of the Notice to Mining Claimants, Sacramento 060277, whether or not the claims are dormant, and whether or not the lands included within the claims, prior to patent, are subject to use and management by the United States in accordance with the provisions of section 4 of the act of July 23, 1955, supra. The contestant was represented by the Office of the General Counsel, United States Department of Agriculture, while the contestee was represented by Robert C. Lenhard, Attorney.

The Examiner determined, on the basis of the record assembled at the hearing, that a valuable mineral deposit such as would justify or sustain a patent application has not been made on any of the claims. The Examiner stated that his decision did not rule on the validity or invalidity of the mining claims and that the mining claimant is free to explore and prospect the lands so long as they remain open under the mining laws.

The Examiner dismissed without prejudice the charge relating to the marking of the claim boundaries as there was agreement between the parties that the exposed mineral works examined by the Government's witnesses are within the boundaries of the claims. He also dismissed without prejudice the charge that no verified statement was properly filed as evidence was adduced to show the present claimant was owner of the claims in 1957 and so entitled to respond to the notice published in 1960. He also dismissed, as irrelevant, the charge that the claims were dormant.

A review of the record disclosed that the Hearing Examiner accurately summarized the testimony and evidence adduced at the hearing in his decision. We repeat only these salient points.

Henry W. Jones, a qualified mining engineer employed by the Forest Service, U. S. Department of Agriculture, testified that he had examined all the subject claims on June 15, 1965, in company with Paul Smith, manager of Speckert's mining claims, and guided by a map prepared by one Horton, employed by a predecessor of Speckert. During that examination, Jones testified that he took samples from all workings pointed out by Mr. Smith which he considered worth sampling. The samples were cut from Sunset and Sunset No. 2 claims, and were grabbed from cobbed ore on Sunset No. 2 and Alpha claims. The certificate of assay of the samples shows the manganese content to be very low and the silica and phosphorus content to be relatively high in most of the samples. Only one sample, taken from the cobbed ore, showed that the removal of the siliceous material had upgraded the manganese content to 48%, compatible with the specifications for manganese ore set by the steel industry. Mr. Jones gave his expert opinion that with the exception of the one sample taken from the cobbed ore, the manganese content of the minerals present in the claims was too low to mine economically, and a prudent man would not be justified in spending time, effort or money on the subject claims. He introduced a copy of a letter dated August 9, 1965, in which Kaiser Steel Company, Fontana, California, set forth, inter alia, its general specifications for manganese as 3 inches to 1/8 inch, with no fines, and to grade between 35% and 40% manganese, with an average of 37%, and to have a silica and aluminum content of not more than 20%, and all minor residuals to be less than 0.05%. Mr. Jones stated that the mineral materials on these claims would require upgrading to be acceptable to the steel industry, and that because of a tendency to slime when finely ground, pelletizing would be required to make the recovered manganese acceptable. He reported from his examinations of the claims that there was no indication of any activity other than annual assessment work for the past several years, although he did ascertain that approximately 222 tons of ore were shipped from the Sunset No. 2 claim during the manganese purchasing program for stock-piling by the Government. He entered as evidence a study of California manganese deposits made by the United States Bureau of Mines (Exh. 7), in which samples from the Sunset group were analyzed and shown to have values similar to those returned for the contestant's assayed samples.

Wesley Moulton, a qualified mining engineer employed by the Forest Service, testified that he had accompanied Mr. Jones in the examination and taking of samples from the Sunset claims in June 1965. He gave his expert opinion that the ore present on the claims is not a good milling ore in that only in certain hand-cobbed pieces which could be shipped without milling could there be any possible money, the rest of the ore containing too much chert or pyrolusite to have any value. He concluded that lack of psilomelane ores precluded a prudent man from being justified in operating the property in the hopes of developing a paying mine.

Jack Siegfried, a qualified consulting mining engineer, geologist and surveyor, appearing on behalf of the contestee, testified that he had been on the Sunset group of claims in 1956 and 1957 for a cursory examination and in 1966 to make a survey of the claim boundaries showing the location of the several pits and trenches cut as improvements, and to take samples of the mineral material. He identified the Sunset group of claims as being 3/4 mile to 3-1/2 miles southeasterly from Lake Almanor. In addition to a plat of his survey (Exh. B), he also outlined the claims on an enlarged aerial photograph (Exh. C), stating there is no substantial difference from the area portrayed on Contestant's Exh. 2. Mr. Siegfried prepared a report of his survey and mineral examination of the Sunset Group of claims (Exh. D), in which he described the general geology of an 18-mile area from Lake Almanor southeasterly to 4 miles south of Mount Hough. The main imposing rock is a carboniferous marine metasediment with manganese deposited as a hydrothermal enrichment in the form of veins. He stated that the work on the Sunset claims has been exploratory, seeking to develop manganese ore. He adduced ore samples from the Sunset group as well as from other manganese claims in the area. The assay reports from his Sunset samples reflect a manganese content quite similar to those submitted by the contestant. Mr. Siegfried indicated that a prudent man might invest further time and energy in Sunset, Sunset Nos. 1, 2, 3, 4, 9, 10, 11, 12 and 13, and Alpha mining claims as a speculative venture in hopes that a government purchase program of low-grade manganese ore might be instituted in the future. Such a program of purchasing these ores might ensue if the present foreign sources of manganese are shut off. He suggested that he would not recommend further expenditure of money in connection with Sunset Nos. 5, 6, 7, and 8 claims. Mr. Siegfried reported his recommendation to owners of low-grade manganese mining claims is to maintain the claims until a favorable market arises.

Mr. Armin Speckert, the mining claimant, testified in his own behalf as to the time and manner of his acquisition of the mining claims, stating that he had purchased the mining claims from Bill McMillan [sic] under a sales contract in 1956 or 1957, receiving a quitclaim deed in 1960 when the total purchase price of $10,000 had been paid in full. He stated that it was his understanding that all logging operations on the claimed area were authorized by the Forest Service, and none had been done by or for him.

Paul Smith testified that he, as representative of Mr. Speckert, had accompanied Mr. Jones and others during an examination of the claims in 1965, showing them the pits and other improvements.

Miles Timmins, a witness for the claimant, testified that he owns manganese claims about 6 miles from the Sunset group, that while the formations are similar there is a little difference in the ore, his being a braunite and pyrolusite while that on the Sunset is psilomelane. Under the present depressed market he is not selling any ore but he stated that a beneficiating plant in the area would improve the opportunity to sell the ore from the Sunset group as well as from other manganese claims in the area. He said that a prudent man might not invest labor and money in the Sunset group at this time but with improved prices for manganese ore a prudent man would so invest. During the Government stockpiling program, 40% manganese ore meeting the Government's specifications brought $2.30 a long ton unit, F.O.B. the railhead. Mr. Timmins testified that he thought he could make a small profit selling his ore at 75-80¢ per unit F.O.B. the railhead at Crescent Mills, California, but that he had no buyers.

In a proceeding under section 5 of the Act of July 23, 1955, supra, to determine the rights of a mineral claimant to the surface resources of his mining claims, the claims are properly subject to the terms and limitations of section 4 of the act, supra, unless it is shown that there was a valid discovery within the meaning of the mining laws within the limits of each claim prior to the date of the act. United States v. Melvin E. Viles et al., A-30646 (January 31, 1967).

As set forth in the Hearing Examiner's decision, the requirements for discovery of valuable minerals are set forth in the "prudent man" test, Castle v. Womble, 19 L.D. 455 (1894), approved in Chrisman v. Miller, 197 U.S. 313 (1905), and reaffirmed in Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963), which is:

> where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of . . . /a discovery/ have been met. 19 L.D. at 457.

The classic test to be applied in determining whether a discovery has been made on a lode claim is that set forth in Jefferson-Montana Copper Mines Company, 41 L.D. 320, 323 (1912), as follows:

> 1. There must be a vein or lode of quartz or other rock in place;
>
> 2. The quartz or other rock in place must carry gold or some other valuable mineral deposit;
>
> 3. The two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine. It is clear that many factors may enter into the third element: the size of the vein, as far as it is disclosed, the quality and quantity of mineral it carries, its proximity to working mines and location in an established mining district, the geological conditions, the fact that similar veins in the particular locality have been explored with success, and other like facts, would all be considered by a prudent man in determining whether the vein or lode he has discovered warrants a further expenditure or not.

On the basis of the evidence presented, the low values of the mineral, together with lack of certainty as to their extent, disclose nothing more than that further exploration may be warranted. But the showing that more exploratory work is desirable does not constitute a discovery. United States v. Clyde R. Altman and Charles M. Russell, 68 I.D. 235

(1961); United States v. Ford M. Converse, 72 I.D. 141 (1965), sustained in Converse v. Udall in the United States District Court for the District of Oregon, Civil No. 65-581, September 14, 1966.

The mere showing of the presence of manganese minerals within the limits of a mining claim without a showing that the minerals have a present value does not meet the requirements of the mining laws that to validate a mining claim a discovery of a valuable mineral deposit within the limits of the claim must be made. Julius R. Guglielmetti, A-27871 (May 13, 1959). See also United States v. Theodore R. Jenkins, A-30409 (March 1, 1966), and cases cited, holding that mining claims asserting a discovery of low-grade manganese deposits for which there is not a present market do not satisfy the prudent man test.

The appellant disputes the correctness of the Hearing Examiner's application of the legal rule of discovery to the proceeding under the Act of July 23, 1955, supra, with the conclusion that because Speckert did not prove enough at the hearing to justify a patent he must lose his pre-1955 rights to the timber resources. He contends that as a mining claimant he has vested rights which cannot be taken away so long as he complies with the mining laws. He argues that the United States did not make a prima facie showing as to each claim. Although conceding the Government's ore samples were shown to be of low grade which would not justify a present mining operation at a profit, the appellant contends that the mineral showing is such that a reasonably prudent man would expend further money with reasonable prospects of developing a paying mine, asserting that his claims are similar to many neighboring claims for manganese in the same geological formation from which manganese was profitably mined when the price was higher than the present market. Speckert requested a further hearing to present further evidence upon issues of fact, previously subject to the hearing before the Hearing Examiner.

The appellant cited United States v. Shoup, 71 I.D. 144 (1964), in support of his contention that he has a "discovery" on the subject mining claims. That case held that although a mining claim may have been valid in the past because of a discovery in the claim of a valuable mineral deposit, the mining claim will lose its validity if the mineral deposit ceases to be valuable because of a change in economic conditions. The decision is now on appeal for judicial review in a proceeding styled Leo E. Shoup v. Udall, Civil 5822 (Phoenix) in the United States District Court for the District of Arizona.

The appellant has no rights to the surface resources in the mining claims as against the United States unless each such mining location is supported by a discovery. No location of a lode mining claim may be made until the discovery of a vein or lode within the limits of the claim. (Rev. Stat. § 2320 (1875); 30 U.S.C. § 23 (1964)). This requirement has been interpreted by the United States Supreme Court in Union Oil Company v. Smith, 249 U.S. 337 (1919) to mean that since, as a practical matter, exploration must precede the discovery of minerals and some occupation of the land ordinarily is necessary for adequate and systematic exploration, those who enter unoccupied public land for the purpose of exploration are not treated as trespassers but as licensees and a miner may hold the place in which he may be working against all others having no better right. While he remains in possession, diligently working towards discovery, he is entitled, at least for a reasonable time, to be protected against interference by others. Thus the occupancy of which the mining laws speak must be for the purpose of exploration. Occupancy for other purposes is not recognized as occupancy under the mining laws. Discovery is the indisputable fact necessary to give the claim validity. That validity dates from the time of discovery, and it is immaterial whether the marking of the claim and recording of the notice of location comes before or after discovery. By discovery, and only by discovery, the mining claimant initiates rights as against the United States. Davis v. Nelson, 329 F. 2d 840 (9th Cir. 1964). See United States v. Ed and Leona Jaensch, A-30225 (April 29, 1965).

The expert witnesses for the Government testified that no discovery of a valuable mineral deposit was evident on any of the subject claims, from their examination of the exposed workings. This testimony made a prima facie case for the Government. The burden then shifted to the mining claimant to show by a preponderance of the evidence that there is a present existing discovery of a valuable mineral deposit within the limits of each claim. Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959). This the appellant did not do. At best, his expert witness only corroborated the showing of the Government that only deposits of low-grade manganese had been found on any of the claims, mining of which is not justified at this time because of unprofitable return from such operations. And although his witness stated his opinion that further exploration is warranted, a willingness to perform additional exploration is not a substitute for discovery. See United States v. C. F. Snyder et al., 72 I.D. 223 (1965).

After careful examination of the record, we find that while the evidence indicates the presence of manganese ores on the claims, further exploration is required to determine whether a valuable deposit of manganese does exist within the limits of the claims, and that the values of the manganese shown do not demonstrate that there has been a discovery of a valuable mineral deposit prior to July 23, 1955, within the meaning of the mining laws. Thus, as the evidence clearly sustains the conclusions of the Hearing Examiner, he properly found the Sunset, Sunset Nos. 1 to 13, inclusive, and Alpha lode mining claims to be subject to the terms and limitations of section 4 of the Act of July 23, 1955, supra.

Since this proceeding is one concerned only with the question of the right of the United States to manage the nonmineral surface resources of the claims, the claimant is free to continue his search for a valuable mineral deposit so long as the land remains open to the operation of the mining laws. The only consequence of this proceeding is that his use of the land embraced in these claims is limited to mining and other uses of the land incidental to mining. Until the claimant obtains a patent under the mining laws, the surface resources of the claims are subject to the right of the United States to manage and dispose of them under section 4 of the act of July 23, 1955, supra. This will not inhibit any mining activity that the appellant may wish to conduct on the claims.

The request for a second hearing is denied as no error is shown in the first proceeding, which found the claims subject to the terms and provisions of section 4 of the Act of July 23, 1955, supra, for lack of discovery of a valuable mineral deposit, and because there is no substantial equitable basis warranting a new hearing. There are no recognizable equities in the claimant simply by virtue of expenditures for mining purposes or prospecting, since under the Surface Resources Act of 1955 a claimant of a mining claim perfected by discovery after the date of the Act has no right to use the surface for other purposes prior to patent. See United States v. Lawrence R. Dowell, A-30614 (November 21, 1966).

The decision appealed from is affirmed.

Mr. A. Speckert is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers all fifteen mining claims adversely affected by this decision, the total filing fee is $75. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error. If an appeal is taken, the adverse party to be served is: Regional Attorney, Office of the General Counsel, United States Department of Agriculture, 630 Sansome Street, San Francisco, California 94111.

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION
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OPD
Adm Asst, Ap & He
Gower Federal Service
Appeals List No. 1
DEH

Mining Claims: Discovery 3413

It is proper to hold a placer mining claim null and void where the evidence does not show the discovery of a valuable mineral deposit which would justify a prudent man in the further expenditure of time and money with a reasonable prospect of success in an effort to develop a valuable mine.

United States v. Victor DeLucchi et al., Contest 080219 (Sacramento) (October 30, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 NOV 20 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In reply refer to:
704
Contest 080219
(Sacramento)

(October 30, 1967)
CERTIFIED MAIL
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DECISION

United States of America,
Contestant
v.
Victor DeLucchi,
Raymond W. Hansen,
Carl T. Hansen,
Albert L. Volkin and
Angelo A. Martignone,
Contestees

Involving Five Finger
Mine placer mining claim,
situate in section 24, T.
23 N., R. 6 E., M.D.M.,
Plumas County, California,
within Plumas National
Forest

Decision Affirmed

Victor DeLucchi, a contestee, has appealed from the Hearing Examiner's decision dated June 14, 1967, which declared the Five Finger Mine placer mining claim null and void for lack of a discovery of valuable mineral deposits within the limits of the claim.

A complaint charging there is no disclosure within the boundaries of the mining claim of mineral materials in quantity, quality and value to constitute a discovery, was issued at the request of the Regional Forester (San Francisco), Forest Service, United States Department of Agriculture. The contestees timely filed an answer denying the charges. A hearing was held February 28, 1967, at Sacramento, California. The contestant was represented by the Office of the General Counsel, U. S. Department of Agriculture. The contestees were represented by Thomas S. Harte, attorney.

The testimony and evidence adduced at the hearing is adequately summarized in the Hearing Examiner's decision. The Five Finger Mine placer mining claim was located September 24, 1963, in Granite Basin about 15 miles southwesterly from Quincy, California. The mineral referred to is gold. The claim is covered mostly by granitic material with only a small quantity of auriferous gravels. The only working on the claim is a dozed pit, 10' x 20' x 2', to bedrock. Essentially the expert testimony for the contestant showed gold in such minute amounts that a prudent man would not be justified in expending further time, money and effort on this claim with a reasonable expectation of developing a paying mine. The testimony and evidence given by the contestees were not to the contrary on the mineral values demonstrated.

From the evidence submitted the Hearing Examiner concluded that the contestees' mining claim was null and void for lack of discovery.

On appeal it is contended, while conceding no appreciable mineral values have been demonstrated within the claim, that contestees should be allowed to work the claim more extensively to prove that valuable metals may be extracted in large quantities. It is argued that the prudent man doctrine should not be applied until the claimants have had time to develop the claim to its maximum potential.

The location of "valuable mineral deposits" in lands belonging to the United States is authorized by the mining laws. 30 U.S.C. §§ 22, 35 (1964). Under the mining laws one may take possession of vacant public land open to mining location under those laws and, after filing notice of location, retain that possession against all except the Government while he is in diligent prosecution of efforts to discover valuable mineral therein, but when the Government withdraws its consent to such location, either by withdrawing the land from the operation of the mining laws or by the institution of adverse proceedings against a mining claim, the mining claimant must show that he has made a discovery of valuable mineral deposits within the limits of his claim in order to retain his possession. United States v. Everett Foster et al., 65 I.D. 1 (1958). Although such deposits are not defined in this law, the Department of the Interior, with judicial approval, has consistently adhered to the definition of value laid down in Castle v. Womble, 19 L.D. 455, 457 (1894); Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963), that minerals must be found and the evidence must be of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine.

An unpatented mining claim is valid against the United States if there is a present discovery within the limits of the claim, if the land is still valuable for its mineral, and if other statutory requirements have been met, but so long as the legal title remains in the United States, the Government has power, after proper notice and a hearing, to determine whether the claim is valid and, if found invalid, to declare it null and void. Best v. Humboldt Placer Mining Company, supra; Cameron v. United States, 252 U.S. 450 (1920).

The Department has held that there is a distinct difference between exploration and discovery under the mining laws. Exploration work is that which is done prior to a discovery in an effort to determine whether the land contains valuable minerals. It is only when the exploratory work shows that minerals exist in such quantities and in such values that there is a reasonable prospect of success in developing a paying mine that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made. United States v. John L. Cooper et al., A-30267 (May 11, 1965); United States v. Clyde R. Altman and Charles M. Russell, 68 I.D. 235 (1961).

In a contest against a mining claim, the Government has the burden of establishing a prima facie case against the validity of the claim and the burden then shifts to the claimant to prove validity of the claim by a preponderance of the evidence. United States v. Jesse Edwards, A-28145 (January 20, 1960); United States v. Robert Hight et al., A-30256 (April 21, 1965); Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959).

At the contest hearing the testimony of the Government's mining engineer clearly established a prima facie case that the Five Finger Mine placer mining claim was invalid for lack of a discovery of a valuable mineral deposit. The contestees then had the burden of proving by a preponderance of the evidence that a valid discovery does exist within the limits of the claim. This they failed to do.

Nor does the appeal refute the finding of the Hearing Examiner as to the inadequacy of their showing to overcome the Government's prima facie case.

Accordingly, the decision of the Hearing Examiner is affirmed.

Mr. Victor DeLucchi is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed, the appellant will have the burden of proving wherein the decision appealed from is in error. If an appeal is taken, the adverse party to be served is Attorney in Charge, Office of the General Counsel, U.S. Department of Agriculture, 630 Sansome Street, San Francisco, California 94111.

Frances A. Patton
Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

Dist. on page 4

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FS, Div Watershed Mgmnt, USDA, Washington, D. C. (12)
Gower Federal Service
Appeals List No. 1
Adm Asst., Hearings
DEH

Last 2-9-68 appeal to Sec.
affirmed A-30928 1-30-69

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1967 DEC 8 PM 3 22

Mining Claims: Determination of Validity 3400.1

Where a mineral patent applicant seeks to demonstrate a valid discovery on contested placer mining claims by evidence relating to an experimental machine complex alleged to extract mineral values not recoverable or shown by standard mining procedures, the hearing examiner must consider the claimant's alternate plan for extracting precious metals, as shown by the evidence adduced at the hearing, in determining whether a valid discovery has been shown on the claims.

Where a mining claim is based upon the existence of "invisible values" which are proposed for extraction by a technology only demonstrated by a small laboratory-type machine complex, the patent applicant has not sustained the burden of proof necessary to validate the mining claim where the costs are in excess of the values in minerals which were thereby extracted.

United States v. California Alluvial Mining Corporation, Sacramento Contest 070384 (October 31, 1967)

In reply refer to:
704
Sacramento Contest
No. 070384

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

October 31, 1967

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America,
Contestant,
v.
California Alluvial Mining Corporation,
Contestee-Appellant.

Empire, North Star, Cedar, Yellow Pine, Snow White, 1/ Snow Diggins, Clear Water, and Meadow View placer mining claims located in secs. 12 and 13, T. 26 N., R. 8 E.; and secs. 7 and 18, T. 26 N., R. 9 E., M.D.M., California, within the Plumas National Forest.

Decision Affirmed

California Alluvial Mining Corporation has appealed from the Hearing Examiner's decision dated April 5, 1967, which held that its above-identified mining claims are null and void for lack of a discovery thereon and which rejected its mineral patent application for the claims, on the basis of the record of a hearing in the contest proceeding held on November 22 and 23, 1966. The contest complaint had charged, in pertinent part, that the existence of a deposit of valuable minerals of sufficient quantity to constitute a valid discovery is not disclosed within the boundaries of the mining claims.

The hearing record shows a mining engineer employed by the Forest Service, United States Department of Agriculture, testified he made mineral examinations of the claims on several occasions and that he sampled all places indicated by the claimant as points of discovery (1st Tr. 27). He detailed the manner in which he took his samples, reduced some of them to concentrates, and sent the concentrates and 500 pounds of bulk material to an assayer to test for gold, platinum, and silver values (1st Tr. 26, 55-56, 61, 63-64, 111). The appellant argues that the mineral examiner should have provided the mining claimant with portions of the sampled material, but the Forest Service is under no responsibility to do so. The witness stated the samples were taken by him at representative intervals, they show the thickness of the occurrence of whatever materials are exposed, and there was an adequate sampling for an evaluation of the materials exposed at the appellant's discovery points (1st Tr. 71). The values of precious metals per cubic yard of material in place found in the samples, as shown in Exhibits 8a and 15, are:

1/ By departmental decision California Alluvial Mining Corporation, A-29806 (November 13, 1963), a portion of the Snow White claim was finally declared null and void *ab initio* for the reason that the land had been withdrawn from appropriation under the mining laws prior to location of the claim.

Empire claim: 17¢, 8¢, 5¢, 5¢, and no value.
North Star: 32¢, 14¢, 7¢, 3¢, 3¢, and two samples tested no values.
Cedar claim: 60¢, 19¢, 10¢, 3¢, 3¢, and no value.
Snow Diggins: 74¢, 49¢, 10¢, 8¢, and 1¢.
Clear Water claim: 33¢, 9¢, 8¢, and 3¢.

The samples from the Yellow Pine, Meadow View, and Snow White claims all tested from 3¢ to no values.

The witness stated his opinion that the average metallic content of the materials on the claims is so low that, in such physical settings, the cost of removing the materials and separating the values is far in excess of the values which would be recovered, so it is not possible to make a profit from such an operation (1st Tr. 72). He stated his opinion included consideration of the physiographic setting, the geological make-up of the deposits, the extent of the deposits both horizontally and vertically, and the feasibility of various mining processes such as hydraulicing, ground sluicing, shoveling, stationary washing, plant extracting, and "doodle-bug" operations (1st Tr. 73).

The evidence that the values of gold, silver and platinum on the claims are less than the cost of recovering the metals established for the contestant a prima facie case of lack of a valid discovery on any of the claims. The burden of proof then shifted to the claimant to show by a preponderance of the evidence the validity of its claims. Converse v. Udall, 262 F. Supp. 583, 596 (1966).

Mr. Kenneth Knapp, president of the corporation, testified that he is in charge of the mining operations (2nd Tr. 3). He stated that he is a grading contractor with experience in dirt moving and tunnel drilling, but is not an experienced miner (2nd Tr. 6). Mr. Knapp took samples [2] which are higher grade than those found by the Forest Service. [3] Nevertheless, the appellant concedes that such values will not support mining operations by usual practices. Mr. Knapp stated his opinion that there are materials on the claims so laden with clay that they hold gold particles "as fine as talcum powder," which are not shown by usual assay tests and cannot be recovered by usual mining procedures. He believes that if this invisible gold is freed from the clay, the total values recovered from the material will support a successful mining operation (2nd Tr. 27-28).

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[2] As to those samples where he could not show the size, or the place where taken, such samples are meaningless and assay reports concerning them cannot be interpreted. United States v. Swante C. A. Pirkola, A-30559 (June 29, 1966).

[3] Selective sampling is not representative of the material sampled. Such sampling is shown at hole 29, where Mr. Knapp obtained gold values of $3.74 per ton by "taking a little from here and there out of the pile," after merely obtaining a sample worth 84¢ per ton the first time he sampled there (2nd Tr. 38-39; Exhs. G, G-3). Sampling is cutting a representative

The company assembled an experimental plant. A newly devised scrubber cleans the material under water, using sand and gravel also to free clay from the particles (2nd Tr. 28). Next, the material is sent into a revolving sieve to remove large rocks. Then the material is sent into a concentrator. The "concentrate" is separated by various sized screens. Next, the "concentrates" are placed in a roaster to dry, the theory being that heat from the roaster will cause the material to burst and loosen any invisible gold. The "concentrates" are then taken to an air classifier which blows the material into one of five bins depending on the weight of the particles. Finally, the contents of the bins are pushed by air currents up a canvass with riffles on it, until the gold is theoretically retained and lighter materials fall off. (2nd Tr. 56-58). The appellant objects to the Hearing Examiner calling the treated material "concentrates," but Mr. Knapp referred to the material as concentrates during his testimony (2nd Tr. 16, 56-59, 105, 110). "Concentrate" means to purify by getting rid of useless material. Bureau of Mines Bulletin 95, supra, pages 175-176. It was proper for the Hearing Examiner to refer to the treated material as concentrates. The plant was dismantled and removed prior to the time when the Government mineral examiner could see it completed or in operation (1st Tr. 95-96; 2nd Tr. 52).

No final separation or recovery of precious metals from clay in the material treated by the machine complex had been attempted (2nd Tr. 58-59, 93, 105, 108), so at the hearing greater values were not shown in such material than indicated by assays of untreated material. The Hearing Examiner allowed the contestee to have certain material assayed and to submit reports after the hearing (2nd Tr. 73). The contestee stated in a brief that some such concentrates were later assayed, but admitted that the results were disappointing--stating that the assayers

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Footnote 3 Continued:

part of a deposit which truly represents its average value. Honest sampling requires good judgment and practical experience. Bureau of Mines Bulletin 95 (1947 reprint), page 589.

Mr. Knapp explains the discrepancy by stating he sampled deeper (2nd Tr. 47), and employed assayers who used special techniques (2nd Tr. 32-33). Both parties accuse the other of failing to co-operate so a joint sampling could be taken (1st Tr. 5-13; 2nd Tr. 43-46).

did not follow instructions. Mr. Knapp had no information as to the expenses incurred, but agreed that the cost of extracting the values he assumes to be in the treated material on hand will exceed the values he could recover (2nd Tr. 107-108). Since the experimental plant could only treat a small amount of material in a day, he hopes that if several, much larger machines were constructed, a profitable operation would result (2nd Tr. 58, 60-61).

The Hearing Examiner stated in his decision that "I have considered the accepted standard method for recovery of gold from placer material." However, the contestee did not impeach the Forest Service's evidence that the costs of the more usual recovery operations are so high that such mining of the claims is not feasible. The claimant offered the experimental machine complex as an alternate method of recovering alleged invisible values presumed to be lost by standard recovery procedures. It was error for the Hearing Examiner not to have considered the proposed alternate extraction method. Nevertheless, after a careful consideration of all of the evidence, we find that the alternate plan to use an unknown number of an unknown size of machines similar to the experimental model which can recover an unknown average in values at an unknown cost, is not persuasive. The evidence does not establish the existence of values sufficient to economically support operations. Where a claim is based upon low grade mineral deposits, which are proposed for extraction by a technology having been used only on a laboratory-type basis, the claimant must show that the costs are not in excess of the extraction of minerals. United States v. New Jersey Zinc Company, 74 I.D. 191 (1967). A person of ordinary prudence would not risk his labor and means with a reasonable expectation of success in developing a valuable mine on the claims without his having additional information— including facts as to the average values which can be extracted from treated material, the estimated cost of the proposed operation (including a showing that such costs should be less than the values to be recovered), and a showing that there are adequate reserves of mineral-bearing material economically available to support the operation.

The appellant protests the Hearing Examiner's finding that the geology of the area is primarily slate and sandstone on a calciferous formation. In the absence of a showing that there is material on the claim which bears a valuable mineral deposit, the general geology of the area is not dispositive of the discovery issue.

Mr. Knapp believes there is an ancient channel of alluvial material beneath the Snow Diggins, Cedar, North Star and Empire claims (2nd Tr. 9, 12-13). The channel is exposed in excavations to the north of the contested claims (1st Tr. 102). The Forest Service mineral examiner could not find the channel on the contested claims (1st Tr. 98). Mr. Knapp theorizes that the channel is underneath the claims because he found alluvial material in a 90-foot tunnel on the Snow Diggins claim (2nd Tr. 9), which is the only hole dug on the claims

(2nd Tr. 12). He assumes the course of the channel on the claims is indicated by large trees on the claims which may have been watered by the channel at their roots (2nd Tr. 12-13). A geological inference of a mineral deposit arising from an assumption that an ancient river channel on adjoining property also underlies contested claims has been held not to establish a discovery. See United States v. Jesse Edwards, A-28145 (January 20, 1960). Mr. Knapp has not estimated the amount of gravel on the surface of the claims, but he states the gravel varies from none to 10 feet deep (2nd Tr. 109). The geological inference and the vague estimate as to the quantity of surface gravel on the claims is not a showing that there are adequate reserves of mineral-bearing material on the claims to support mining operations.

The appellant protests that the Hearing Examiner noted that only eight ounces of gold had been recovered from the claims under a loan contract with the Office of Mineral Exploration (30 U.S.C. § 641 et seq. (1964)). It was the contestee's chief witness who testified concerning this contract (2nd Tr. 8, 10, 83, 106). The showing is merely cumulative evidence relating to the unlikelihood of the claims supporting mining operations. There is nothing to show that undue weight was given to such evidence; it was merely referred to in summarizing the evidence.

The appellant cites Snyder v. Udall, Civil No. 66-C-131 (April 18, 1967), and asserts that the Department's test for discovery erroneously requires that a trained mining engineer or geologist must be satisfied that the claims are commercially valuable. In fact, the Department's requirements for a discovery of valuable minerals, set forth in the "prudent man test" in Castle v. Womble, 19 L.D. 455 (1894), approved in Chrisman v. Miller, 197 U.S. 313 (1905), and recently reaffirmed in Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963), is that minerals must have been found and the evidence be of such character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. Applying the "prudent man test" of discovery, the evidence adduced at the hearing does not preponderate that a valid discovery of a valuable mineral deposit has been shown on any of the claims.

The appellant requests that the validity of the claims not be determined and the mineral application not be rejected, but processing of the latter be suspended pending further exploration and experimentation. The company suggests that it hopes then to be able to submit such showing as the Department may require. When the Government withdraws its consent to locations under the mining laws by the institution of adverse proceedings against the claims, the owner must then show that it has made a discovery of a valuable mineral deposit within the limits of each claim in order to retain possession of it. United States v. Harold Dale, A-30465 (January 20, 1966). Where in a contest brought against a mineral patent application it is determined that no discovery has been made on the

claims, the necessary result of this determination of a lack of discovery is that the mining claims are in fact invalid, so the patent application is properly rejected. See United States v. Baranof Exploration Company, 72 I.D. 212 (1965), and the cases cited therein.

For the reasons stated, the Hearing Examiner's decision is affirmed.

California Alluvial Mining Corporation is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D.C. 20240. The filing fee is $5 for each mining claim included in an appeal, so the total filing fee will be $40 if all claims adversely affected by this decision are so included. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed, the appellant will have the burden of showing wherein the decision appealed from is in error. If an appeal is taken the attorney for the adverse party who must be served is:

Regional Attorney, Office of the General Counsel
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Enclosures 2

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Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Gower Federal Service
Appeals List No. 1
JHO'D

appeal to Sec.
affirmed A-30941 10-15-68

Mining Claims: Discovery 3413

Assay certificates without an adequate explanation of the method of obtaining the samples or showing the quantity of material at the place from which the samples were removed, can mean little or nothing of evidentiay value.

Mining Claims: Contests 3482

The establishment of clear title to the lands is sufficient justification for the Department to initiate proceedings to contest the validity of unpatented mining claims on the public domain.

Mining Claims: Common Varieties of Minerals 3511

Decomposed granite that will withstand weight and afford excellent drainage when used in road construction is not locatable under the mining laws as an uncommon variety of mineral since its special characteristics do not give it a special distinct value.

United States v. Owen O. Roberts and David O. Roberts, Sacramento Contests Nos. 080149-C-1 and C-3

NOV 17 1967

In reply refer to:
704
Sacramento Contests
Nos. 080149-C-1 and C-3

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

November 17, 1967

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America, Contestant v. Owen O. Roberts and David O. Roberts, Contestees	:	Involving the Owensville Nos. 1, 3, 4, 5, 6, 7, 8 and 10 placer mining claims, located in Secs. 9, 10, 13, 14, 15, 23 and 24, T. 25 N., R. 16 E., M.D.M., Lassen County, California (partially within the Plumas National Forest).

Decision Affirmed

Owen O. Roberts and David O. Roberts have appealed from a Hearing Examiner's decision, dated June 29, 1967, which declared their Owensville Nos. 1, 3, 4, 5, 6, 7, 8 and 10 placer mining claims null and void because the land included within the limits of each of the claims is nonmineral in character and a discovery of a valuable mineral deposit has not been made on any of the claims.

Counsel for the contestant filed a motion to dismiss the appeal on the basis that it is frivolous and fails to point out in what way the Hearing Examiner erred in his decision. The motion to dismiss is denied, the appeal appearing to set forth a sufficient statement of the appellants' reasons for believing the Examiner's decision is erroneous.

Mr. Owen O. Roberts, one of the contestees, was called as an adverse witness by the contestant. He testified that the mining activities on the claims consisted of obtaining samples for assay; that the contestees removed some lava stone and decomposed granite from the claims for cabin construction; and that some lava stone had been trucked down to the bay area in small quantities for gift purposes. He stated that no material from the claims had ever been sold but that Lassen County had built a road through the claims, using material from the claims, but that the contestees had never received any compensation from this. Metallic minerals have been prospected for only to the extent of sampling, and the metallic minerals prospected for are chiefly iron, some copper, and other minerals in quantity (Tr. 14).

George W. Nielsen, a duly qualified mining engineer employed by the Bureau of Land Management, testified that he examined the claims, accompanied by Mr. Henry Jones, a mining engineer with the Forest Service, U. S. Department of Agriculture, and by the claimant, Mr. Owen Roberts. Mr. Nielsen stated that the claims are located principally on a granitic formation which is quite badly weathered over its entire extent as exposed on the claims. He stated that there is no history of any mineral production from the area. Mr. Roberts pointed out the discovery points on the claims and the mineral or minerals for which he believed the claims to be valuable, in addition to decomposed granite. Thirteen samples were taken from the various locations and assayed for the minerals indicated by Mr. Roberts. The assay reports of the samples are shown on Exhibit 11. Eleven samples were assayed for uranium only, and none was found in any of the samples. One sample contained 2.45% iron, 0.15% manganese, and a trace of titanium. The other sample contained .025% potash and no boron.

Mr. Nielsen further stated that the granitic material has not been used for any commercial purpose in the area in which these claims are located. He interviewed the California Division of Highways and the Road Department of Lassen County. They stated that they occasionally use the material for sanding icy highways and that they have in the past occasionally used it in conjunction with oil, but inasmuch as the material is hydrophilic and as the crystalline structure of the material is very weak, it does not make a suitable construction material for road purposes. The County has occasionally found it suitable to use as a sub-base but not as a base material. Nielsen testified that the granitic material is very widespread, and that he has personally traced the formation in a north-south direction for about 30 miles and that it extends to the west in places for a distance of almost 20 miles. He concluded that the lands embraced within the claims are nonmineral in character and that no discovery of a valuable mineral has been indicated by the samples and the examination.

It was stipulated by the parties that if Mr. Henry Jones, the Forest Service mining engineer who accompanied Mr. Nielsen on his examination of the claims, were to testify, his testimony would be substantially the same as that of Mr. Nielsen.

Mr. Owen O. Roberts testified in his own behalf that there are vast quantities of decomposed granite on the claims and there is little or no other material accessible for the Doyle grade road leading to Frenchman's Dam. He feels that the claims must have been valid or else Lassen County would not have negotiated for the materials and discussed the price they would pay of ten cents per cubic yard. He feels that the fact that the minerals could have been marketed prior to the passage of Public Law 167 is borne out by the fact that Lassen County trespassed on the property and used vast quantities of the minerals for road construction. Special qualifications of the granite on the claims are that it will withstand weight and the drainage is excellent from it. Mr. Roberts stated that he has invested about $30,000 in the claims. Of this amount, $10,000 was for the cabin and retaining walls, $2,000 for jeep trails, and $18,000 for his own labor at $100 per week, travel expenses, and operation of equipment.

At the conclusion of the hearing Mr. Roberts offered Exhibit A in evidence. This exhibit consists of two laboratory reports of qualitative spectrographic analyses and two assay reports of samples for gold and silver. However, there is nothing on the reports to tie the samples with the claims in question, nor did Mr. Roberts offer any testimony to this effect or as to the method of taking the samples.

A valid mining location requires the discovery of a valuable mineral deposit within the limits of the claim (30 U.S.C. §§ 22 and 23 (1964)). The requirements for a discovery of valuable minerals are set forth in the "prudent man" test of *Castle* v. *Womble*, 19 L.D. 455 (1894), approved in *Chrisman* v. *Miller*, 197 U.S. 313 (1905), and reaffirmed by the Supreme Court in *Best* v. *Humboldt Placer Mining Company*, 371 U.S. 334 (1963), which is:

> where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine, the requirements of . . ./a discovery/ have been met. (19 L.D. at 457).

The burden of proof in a contest proceeding in which discovery is in issue is first upon the contestant to establish a *prima facie* case as to non-discovery, and the burden then shifts to the contestee to establish the validity of his claim by a preponderance of the evidence. *Foster* v. *Seaton*, 271 F. 2d 836 (D.C. Cir. 1959). We find that the Government established a *prima facie* case and that the contestees failed to prove discovery on any of the claims by a preponderance of the evidence.

There was no evidence to refute the Government's case as to the lack of any valuable metallic minerals. The assay reports (Ex. A) offered by the contestee without any explanation as to where the samples were taken or the method of taking them are without any probative value. Assay certificates without an adequate explanation of the method of obtaining the samples, or the quantity of material at the place from which the samples were removed, are meaningless. *United States* v. *Swante C. A. Pirkola*, A-30559 (June 29, 1966). Samples and assays without sufficient data of extent of the mineral material sampled can mean little or nothing of evidentiary value. *United States* v. *Northern Pacific Railway Co.*, 1 F. 2d 53, 57 (D. Mont. 1924).

As for the decomposed granite, Section 3 of the act of July 23, 1955 (30 U.S.C. § 611 (1964)) amended the mining laws by removing common varieties of sand, stone, gravel, etc., from the category of valuable minerals which are locatable under the mining laws.

Common varieties are defined in 43 CFR § 3511.1(b), in part, as follows:
"'Common varieties' includes deposits which, although they may have value

for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. . . ." (Underscoring added).

Mr. Owen O. Roberts testified that special qualifications of the decomposed granite on the claims are that it will withstand weight and the drainage is excellent from it. These properties do not give the material a special and distinct economic value so as to take out of the category of the common variety of the general run of such deposits in the area. In United States v. J. R. Cardwell and Frances H. Smart, A-29819 (March 11, 1964) the Department held (syllabus): "Decomposed granitic rock mixed with clay which is easily compacted and therefore suitable for hardsurfacing roadways and other areas subjected to heavy weights is not locatable under the mining laws as an uncommon variety of minerals since its special characteristics do not give it a special distinct value." Also see United States v. Laura Duvall and Clifford F. Russell, 65 I.D. 458, 462 (1958).

The contestees contend that the mining claims were located about a month prior to the act of July 23, 1955, supra, although none of the claims was recorded prior to September 19, 1955. Even if we assume that the claims were, in fact, located prior to July 23, 1955, it would be necessary for the claimants to show that the common variety materials within the limits of the claims could have been extracted, removed and marketed at a profit before that date. United States v. Loyd Ramstad and Edith Ramstad, A-30351 (September 24, 1965). The claims must then fail because the claimants have failed to show that any of the material has ever been removed and sold from the claims.

The appellants allege that the hearing was discriminatory and unbecoming to the Bureau of Land Management as no other individuals in Lassen County have been required to attend hearings. The establishment of clear title to the lands is sufficient justification for the Department to initiate proceedings to contest validity of unpatented mining claims on the public domain. Davis v. Nelson, 329 F. 2d 840 (9th Cir. 1964).

The Hearing Examiner's decision of June 29, 1967, is hereby affirmed.

Owen O. Roberts and David O. Roberts are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each claim included in the appeal. If the appeal covers all eight claims adversely affected by this decision, the total filing fee will be $40. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

If an appeal is taken, the adverse party to be served is:

Regional Solicitor
United States Department of the Interior
P. O. Box 21-4527
Sacramento, California 95821

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
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Mr. Owen O. Roberts (Certified Mail)
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Regional Attorney, Office of the General Counsel, U.S. Department of Agriculture
Hon. George Murphy, United States Senate
Office of the Hearing Examiners, Sacramento, California
Regional Forester, U.S. Department of Agriculture
Office of the General Counsel, United States Department of Agriculture
Forest Service, Div. of Watershed Management, U.S. Department of Agriculture (12)
Adm. Asst., Hearings
Div. of L&M S&T (4)
Div. of L&M PM (2)
Appeals List No. 1
Gower Federal Service
OPD
PLS

Mining Claims: Withdrawn Land 3400.1

A mining claim located on land withdrawn from such entry is null and void *ab initio* and confers no rights upon the locator.

Lillian Ann Blackburn, S 821-D (December 20, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 JAN 5 AM 10 00

In reply refer to:
704
S 821-D

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

December 20, 1967

CERTIFIED MAIL
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DECISION

Lillian Ann Blackburn : Placer Mining Claim
:

Decision Affirmed

Mrs. Lillian Ann Blackburn has appealed from a decision of the land office at Sacramento, California, dated August 14, 1967, which declared null and void *ab initio* the Liller's Project No. 6A placer mining claim, because the lands within the limits of the claim were not open to mining location when the claim was located on November 16, 1963.

The decision correctly pointed out that as near as can be determined from the description in the location notice the claim is situated in the NW¼ sec. 22, T. 13 N., R. 9 E., M.D.M., California.

The records in the land office show that the lands in the NW¼ of Sec. 22 of said township and range were withdrawn from sale and entry and reserved for the California Debris Commission, effective August 5, 1939, pursuant to the act of June 26, 1936 (49 Stat. 1976), and section 21 of the act of March 1, 1893 (27 Stat. 507, 510; 33 U.S.C. § 681 (1964)); that the lands were also included in a withdrawal for Power Project No. 334, effective August 2, 1922, in accordance with the provisions of section 24 of the act of June 10, 1920 (41 Stat. 1062; 16 U.S.C. § 818 (1964)), reserving the lands from entry, location, or other disposal; and that they were further withdrawn from public entry in the first form for reclamation under section 3 of the act of June 17, 1902 (32 Stat. 388; 43 U.S.C. § 416 (1964)), effective September 14, 1942.

The appellant maintains that since location of the claim assessment work has been performed on it, she has paid taxes on it, the mining she has done and will do on the claim will not interfere with any project in the area, and she spent considerable money in exploration work. It is also asserted that the mining debris dam was completed in 1939.

The various acts pursuant to which the lands in the NW¼ of sec. 22 were withdrawn authorized the reservation of lands from entry, location or other disposal. The withdrawal of the NW¼ of sec. 22 for the California Debris Commission has not been revoked. The same is true as to the reclamation withdrawal. In regard to the power project withdrawal made in 1922, whether or not it has been modified by the act of August 11, 1955 (30 U.S.C. § 621 (1964)), which in some instances permits mining locations on power sites, is not material here as the other two withdrawals each prohibit mining locations.

The withdrawals of the land in question are a matter of public record in the land office of the Bureau of Land Management, and the appellant was at liberty to inform herself of the status of the lands by inspection of those records. She is chargeable with knowledge of the legal consequences of the facts that inspection of the records would have disclosed to her. Ted W. Fay et al., A-29781 (January 30, 1964). One of the requisites to the validity of a mining claim is that the land must have been open to mining entry at the time of location. The performance of annual assessment work, the payment of local taxes, or expenditures for exploratory work cannot, collectively or severally, create any rights in a mining claim illegally initiated.

The Department has held that a withdrawal remains in effect until it is revoked. Grace Kinsela, A-30863 (November 16, 1967). Land that is subject to a first form reclamation withdrawal is not open to mineral entry, and the same rule applies to lands reserved for the California Debris Commission. Any mineral locations on such lands are null and void ab initio and can confer no rights upon the locator. Robert K. Foster et al., A-29857 (June 15, 1964), and cases cited, aff'd in Foster v. Jensen, Civil No. 64-1110-WM, in the United States District Court for the Southern District of California (September 13, 1966).

The legal effect of a withdrawal is determinative of the question of availability of land for mining entry and the actual use to which the land has been put or for which it is or is not being presently used is immaterial. David W. Harper et al., 74 I.D. 141 (1967). There is no doubt that the lands in question were in a withdrawal status, closed to mineral entry, at the time appellant's purported claim was located. Therefore, it is void from its inception.

Accordingly, the decision appealed from is affirmed.

Mrs. Blackburn is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D.C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

Dist. on page 3

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OPD
Gower Federal Service
Appeals List No. 1
WHW

Mining Claims: Withdrawn Land 3400.1

A mining claim located on land withdrawn from such entry is null and void *ab initio* and confers no rights upon the locator.

George J. Miller, S 821-A, etc. (December 21, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 JAN 2 AM 10 00

In reply refer to:
704
S 821-A
821-B

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

December 21, 1967

CERTIFIED MAIL
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DECISION

George J. Miller : Placer Mining Claims
:

Decisions Affirmed

Mr. George J. Miller has appealed from separate decisions of the land office at Sacramento, California, dated August 14, 1967, which declared null and void *ab initio* the Miller's Project Nos. (7)A and 5A placer mining claims, because the lands within the limits of the claims were not open to mining location when the claims were located on November 15 and 16, 1963, respectively.

The decision correctly pointed out that as near as can be determined from the descriptions in the location notices the claims are situated in the NW¼ sec. 22, T. 13 N., R. 9 E., M.D.M., California.

The records in the land office show that the lands in the NW¼ of sec. 22 of said township and range were withdrawn from sale and entry and reserved for the California Debris Commission, effective August 5, 1939, pursuant to the act of June 26, 1936 (49 Stat. 1976), and section 21 of the act of March 1, 1893 (27 Stat. 507, 510; 33 U.S.C. § 681 (1964)); that the lands were also included in a withdrawal for Power Project No. 334, effective August 2, 1922, in accordance with the provisions of section 24 of the act of June 10, 1920 (41 Stat. 1062; 16 U.S.C. § 818 (1964)), reserving the lands from entry, location, or other disposal; and that they were further withdrawn from public entry in the first form for reclamation under section 3 of the act of June 17, 1902 (32 Stat. 388; 43 U.S.C. § 416 (1964)), effective September 14, 1942.

The appellant contends, in essence, that he examined the Placer County records on or immediately prior to the location of the subject claims and, since he found no notice of any withdrawal of the lands embraced in the claims, they were public domain lands. It is also asserted that a dam for the collecting and storing of mining debris was completed in 1939 and, therefore, the withdrawal is without authority.

The various acts pursuant to which the lands in the NW¼ of sec. 22 were withdrawn authorized the reservation of lands from entry, location or other disposal. The withdrawal of the NW¼ of sec. 22 for the California

Debris Commission has not been revoked. The same is true as to the reclamation withdrawal. In regard to the power project withdrawal made in 1922, whether or not it has been modified by the act of August 11, 1955 (30 U.S.C. § 621 (1964)), which in some instances permits mining locations on power sites, is not material here as the other two withdrawals each prohibit mining locations.

Mining claims are properly recorded on the county records of the county wherein the mining claim is situated. The status of public domain lands is shown on the public records maintained in the land offices of the Bureau of Land Management which contain essential facts as they relate to the public lands. The public is chargeable with knowledge of the status of such lands as disclosed by those records. One who fails to inspect the public land records to determine whether the lands he is interested in are open to mineral location is negligent at his peril. James C. Forsling, 56 L.D. 281 (1938).

The Department has held that a withdrawal remains in effect until it is revoked. Grace Kinsela, A-30863 (November 16, 1967). Land that is subject to a first form reclamation withdrawal is not open to mineral entry, and the same rule applies to lands reserved for the California Debris Commission. Any mineral locations on such lands are null and void *ab initio* and can confer no rights upon the locator. Robert K. Foster et al., A-29857 (June 15, 1964), and cases cited, aff'd in Foster v. Jensen, Civil No. 64-1110-WM, in the United States District Court for the Southern District of California (September 13, 1966).

The legal effect of a withdrawal is determinative of the question of availability of land for mining entry, and the actual use to which the land has been put or for which it is or is not being presently used is immaterial. David W. Harper et al., 74 I.D. 141 (1967). There is no doubt that the lands in question were in a withdrawal status, closed to mineral entry, at the time appellant's purported claims were located. Therefore, the claims are void from their inception.

Accordingly, the decisions appealed from, declaring the Miller's Project Nos. (7)A and 5A placer mining claims null and void *ab initio*, are affirmed.

Mr. Miller is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers both mining claims adversely affected by this decision, the total filing fee will be $10. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
Mr. George J. Miller (Certified Mail)
Regional Director, Bureau of Reclamation, U.S. Dept. of the Interior (6)
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OPD
Gower Federal Service
Appeals List No. 1
WHW

min

Mining Claims: Withdrawn Land 3400.1

A mining claim located on land withdrawn from such entry is null and void ab initio and confers no rights upon the locator.

Frank M. Blackburn, S 821-C (December 21, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 JAN 5 AM 10 00

In reply refer to:
704
S 821-C

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

December 21, 1967

Certified Mail
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DECISION

Frank M. Blackburn : Placer Mining Claim

Decision Affirmed

Mr. Frank M. Blackburn has appealed from a decision of the land office at Sacramento, California, dated August 14, 1967, which declared null and void *ab initio* the Miller's Project No. 4A placer mining claim, because the lands within the limits of the claim were not open to mining location when the claim was located on November 16, 1963.

The decision correctly pointed out that as near as can be determined from the description in the location notice the claim is situated in the NW¼ sec. 22, T. 13 N., R. 9 E., M.D.M., California.

The records in the land office show that the lands in the NW¼ of sec. 22 of said township and range were withdrawn from sale and entry and reserved for the California Debris Commission, effective August 5, 1939, pursuant to the act of June 26, 1936 (49 Stat. 1976), and section 21 of the act of March 1, 1893 (27 Stat. 507, 510; 33 U.S.C. § 681 (1964)); that the lands were also included in a withdrawal for Power Project No. 334, effective August 2, 1922, in accordance with the provisions of section 24 of the act of June 10, 1920 (41 Stat. 1062; 16 U.S.C. § 818 (1964)), reserving the lands from entry, location, or other disposal; and that they were further withdrawn from public entry in the first form for reclamation under section 3 of the act of June 17, 1902 (32 Stat. 388; 43 U.S.C. § 416 (1964)), effective September 14, 1942.

The appellant maintains that since location of the claim assessment work has been performed on it, he has paid taxes on it, the mining he has done and will do on the claim will not interfere with any project in the area, and he has spent considerable money in exploration work. It is also asserted that the mining debris dam was completed in 1939.

The various acts pursuant to which the lands in the NW¼ of sec. 22 were withdrawn authorized the reservation of lands from entry, location or other disposal. The withdrawal of the NW¼ of sec. 22 for the California Debris Commission has not been revoked. The same is true as to the reclamation withdrawal. In regard to the power project withdrawal made in 1922, whether or not it has been modified by the act of August 11, 1955 (30 U.S.C. § 621 (1964)), which in some instances permits mining locations on power sites, is not material here as the other two withdrawals each prohibit mining locations.

The withdrawals of the land in question are a matter of public record in the land office of the Bureau of Land Management, and the appellant was at liberty to inform himself of the status of the lands by inspection of those records. He is chargeable with knowledge of the legal consequences of the facts that inspection of the records would have disclosed to him. Ted W. Fay et al., A-29781 (January 30, 1964).

One of the requisites to the validity of a mining claim is that the land must have been open to mining entry at the time of location. The performance of annual assessment work, the payment of local taxes, or expenditures for exploratory work cannot, collectively or severally, create any rights in a mining claim illegally initiated.

The Department has held that a withdrawal remains in effect until it is revoked. Grace Kinsela, A-30863 (November 16, 1967). Land that is subject to a first form reclamation withdrawal is not open to mineral entry, and the same rule applies to lands reserved for the California Debris Commission. Any mineral locations on such lands are null and void ab initio and can confer no rights upon the locator. Robert K. Foster et al., A-29857 (June 15, 1964), and cases cited, aff'd in Foster v. Jensen, Civil No. 64-1110-WM, in the United States District Court for the Southern District of California (September 13, 1966).

The legal effect of a withdrawal is determinative of the question of availability of land for mining entry and the actual use to which the land has been put or for which it is or is not being presently used is immaterial. David W. Harper et al., 74 I.D. 141 (1967). There is no doubt that the lands in question were in a withdrawal status, closed to mineral entry, at the time appellant's purported claim was located. Therefore, it is void from its inception.

Accordingly, the decision appealed from is affirmed.

Mr. Blackburn is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures

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Mr. Frank M. Blackburn (Certified Mail)
Regional Director, Bureau of Reclamation, U. S. Dept of the Interior (6)
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Div. of L&M PM (2)
OPD
Gower Federal Service
Appeals List No. 1
WHW

Appealed to Sec
A-31036 affirmed 3-4-70

Mining Claims: Discovery 3413

In order to satisfy the requirement for discovery on a mining claim located for common varieties of decomposed granite prior to July 23, 1955, it must be shown that the materials were extracted, removed and marketed at a profit before that date; and, where the evidence presented by the mining claimants shows that they had received an average of approximately $207 per claim per year from the sale of such materials over a period of two years preceding July 23, 1955, the mining claimants have failed to prove a timely discovery by a preponderance of the evidence.

There must be a discovery of a valuable mineral deposit within the limits of each mining claim, and a discovery on one claim does not inure to the benefit of an adjoining claim.

United States v. Amos D. Robinette and Lena S. Robinette, Riverside 05104 (July 18, 1968)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 AUG 5 AM 10 00

In reply refer to:
704
Riverside 05104

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

July 18, 1968

CERTIFIED MAIL
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DECISION

United States of America, Contestant v. Amos D. Robinette and Lena S. Robinette, Contestees	:	Involving the Placer X, Placer X Nos. 2, 3, 4, and 5 placer mining claims located in Sec. 10, T. 3 N., R. 7 W., S.B.M., San Bernardino County, California (within the San Bernardino National Forest)

Decision Affirmed

Amos D. Robinette and Lena S. Robinette have appealed from a Hearing Examiner's decision, dated August 25, 1965, which declared their above-captioned mining claims null and void for the lack of a timely discovery of a locatable mineral deposit on any of the claims.

This proceeding was initiated by the filing of a contest complaint by the Bureau of Land Management at the request of the Forest Service, United States Department of Agriculture, alleging, inter alia, that a discovery of a valuable deposit of a locatable mineral has not been made within the limits of the unpatented mining claims. The contestees filed an answer, denying the charges in the contest complaint and affirmatively alleging that each of the claims contains deposits of building stone, gravel, and decomposed granite of quantity and quality sufficient to warrant a reasonably prudent man in the further development of each claim.

At the hearing held at San Bernardino, California, on February 2, 1965, Emmett B. Ball, Jr., a duly qualified Forest Service mining engineer, testified for the contestant. He was on the claims several times, either by himself or with representatives of the Forest Service. He went over the claims with the claimant in December 1963. He was on the claims several times subsequently, the last time being the day before the hearing. The claimant told him that he was using the material for rock, gravel, and decomposed granite. The claims are near the town of Wrightwood. The claimant said the material was used for driveways, pads for cabins and houses, and just for general fill in yards, and that he got $2 a yard for it delivered. Similar material is extensive in the area. Mr. Ball stated that around the claims there are a couple of sections that have the same type of material, and the same material exists for several miles along the north side of Wrightwood.

Mr. Ball described several cuts and pits on the claims, and two flat beds where desert mix or black top had been made. He stated that black top is

made by pouring hot oil on the decomposed granite and by blading the combined materials back and forth several times until it is thoroughly mixed. It is used for black-topping driveways and streets. He estimated the amounts of material that had been removed from the claims from questioning the claimant, by pacing off the pits, and from knowing about what it takes to fill a hole. He estimated 150 or 175 cubic yards of material removed from Placer X; 1,500 yards from Placer X No. 2; 20 or 25 yards from Placer X No. 3; 700 to 800 cubic yards from the southern pit on Placer X No. 4, and between 600 and 1,000 yards from the remaining pits on that claim; and 100 to 200 cubic yards from Placer X No. 5. He stated that there is other decomposed granite on Forest Service land, which the Forest Service will sell for 10 cents a cubic yard.

Mr. Amos D. Robinette, one of the contestees, testified in behalf of the contestees, that he had removed material from the claims but he did not know how much from each claim. He said that his sales tax reports will show that he sold a certain amount each year from the entire claims, not from each and every pit. Refreshing his memory from his sales tax reports, he testified to the following sales of materials from these claims in the years 1953, 1954 and 1955:

Fourth quarter, 1953 -	$ 55.24
First quarter, 1954 -	none
Second quarter, 1954 -	668.00
Third quarter, 1954 -	163.54
Fourth quarter, 1954 -	214.70
First quarter, 1955 -	none
Second quarter, 1955 -	262.93
Third quarter, 1955 -	706.88
Fourth quarter, 1955 -	194.50

Mr. Robinette said that he did not have his sales record for 1956. He recalled that in 1957 he supplied material for the streets of a subdivision in Wrightwood, that he placed material on the streets and made black top and spread it, using approximately 600 cubic yards of material. In 1958 he sold a total of 363 cubic yards with a value of $1.50 a yard, a total of $544.50, as well as 1,050 cubic yards of black top, valued at $7,875, which is the price and value of the material delivered and spread on the job, using approximately 900 cubic yards of material. In 1959 he sold 670 cubic yards of decomposed granite for $1,050, and $12,561 worth of black top delivered and spread, using 1,130 cubic yards of material. In 1960 he sold 639 cubic yards of decomposed granite valued at $958, and $3,682 worth of black top, containing 332 cubic yards of material; in 1961 a total of 913 cubic yards of decomposed granite of a value of $1,368.50, and black top valued at $749, containing 75 yards of material; in 1962 a total of 483 cubic yards of decomposed granite with a value of $724.50, and black top worth $4,569.35, containing 400 cubic yards; in 1963 he sold 455 cubic yards of decomposed granite for $568.50, and black top worth $3,270, containing 300 cubic yards of material; and in 1964 he sold 657 yards of decomposed granite valued at $985.50, and black top valued at $3,833, containing 345 yards of material.

On cross-examination, Mr. Robinette stated that he has other claims which are patented and that some of the material sales included in his sales tax returns for 1954 and 1955 did come from the patented claims. Also included therein were 50 cubic yards of building rock for $250 that he had sold in 1954, although he has not sold any building rock from the claims since that date. He said that in 1953, 1954 and 1955 his customers used the decomposed granite mostly for driveways and subbase for concrete floors, and that the same purposes would commonly be served by ordinary gravel.

Mr. Joseph L. Meluso, a general contractor specializing in home building and excavation, testified for the contestees. He has been using material from the claims for the past two years. He described the material as being of an excellent quality with very little topsoil in it. Recently he has agreed to purchase the Placer X and Placer X No. 3 claims for a price of $6,500, payable at the rate of $100 a month.

The appellants have taken exception to the Hearing Examiner's treatment of the material on the claims as a common type of material, contending that the undisputed testimony was that no other decomposed granite suitable for the needs of the community is available in the area. There is no basis in the record for this contention. The Government witness testified that similar material is extensive in the area and that the same material exists for several miles along the north side of Wrightwood. On cross-examination, Mr. Robinette said that in 1953, 1954 and 1955, his customers used the material mostly for driveways and subbase for concrete floors and that the same purposes would commonly be served by ordinary gravel. We find that the materials are common variety materials for the reasons hereinafter given.

The Department defines "common varieties," in pertinent part, in regulation 43 CFR 3511.1(b):

> "Common varieties" includes deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. * * *

The Department has consistently held that sand and gravel suitable for road base, asphalt mix and concrete aggregate without expensive processing but which are used only for the same purposes as other widely available, but less desirable, deposits of sand and gravel, are common varieties of sand and gravel and not locatable under the mining laws since the act of July 23, 1955 (30 U.S.C. §§ 601-615 (1964)), as these facts do not give them a special, distinct value. See United States v. Loyd Ramstad and Edith Ramstad, A-30351 (September 24, 1965), and United States v. R. R. Hensler, Sr. et al., A-29973 (May 14, 1964).

Furthermore, in a recent decision in the case of United States v. U. S. Minerals Development Corporation, 75 I.D. ____, A-30407 (April 30, 1968), the Department held (syllabus): "To determine whether a deposit of building stone or other substance listed in the act of July 23, 1955, is of a common

or uncommon variety, there must be a comparison of the deposit with other deposits of similar type minerals in order to ascertain whether the deposit has a property giving it a distinct and special value. If the deposit is to be used for the same purposes as minerals of common occurrence, then there must be a showing that some property of the deposit gives it a special value for such use and that this value is reflected by the fact that the material commands a higher price in the market place. If, however, the stone or other mineral has some property making it useful for some purpose for which other commonly available materials cannot be used, this may adequately demonstrate that it has a distinct and special value." (Underscoring added). Although the record contains no evidence as to what price other suppliers were getting for similar material, it is logical to assume that the low price of $1.50 per cubic yard delivered is no more than other suppliers in the area would obtain.

The rule of discovery was announced by the Department in Castle v. Womble, 19 L.D. 455 (1894), and was quoted and approved by the Supreme Court of the United States in Chrisman v. Miller, 197 U.S. 313 (1905). It reads:

> Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

With respect to nonmetallic deposits of widespread occurrence, the Department has long adhered to the rule that the material must be extracted, removed and marketed at a profit before the mineral substance may be considered a valuable mineral deposit. Layman et al. v. Ellis, 52 L.D. 714, 721 (1929). Since enactment of the act of July 23, 1955, supra, the Department has consistently held, and with judicial approval, that, in order to satisfy the requirement for discovery on a mining claim located for common varieties of sand and gravel prior to July 23, 1955, it must be shown that the materials could have been extracted, removed and marketed at a profit before that date. United States v. Loyd Ramstad and Edith Ramstad, supra; United States v. Everett Foster et al., 65 I.D. 1 (1958), which was affirmed by the United States Court of Appeals for the District of Columbia in Foster v. Seaton, 271 F. 2d 836 (D. C. Cir. 1959). See also United States v. Coleman, 390 U.S. 599 (1968), in which the Supreme Court of the United States upheld the marketability test, stating that it is a logical complement to the "prudent man" test which the Secretary has been using to interpret the mining laws since 1894.

In a contest brought against a mining claim, the Government has the burden of establishing a prima facie case against the validity of the claim, and the burden then shifts to the claimant to prove validity of the claim by a preponderance of the evidence. Foster v. Seaton, supra.

The appellants contend that they established the marketability of the materials before July 23, 1955. In reviewing the evidence, we do not believe

that the discovery of a valuable mineral deposit before that date was established by a preponderance of the evidence.

The Department has held that there must be a discovery of a valuable mineral deposit within the limits of each claim, and that a discovery on one claim does not inure to the benefit of an adjoining claim. See United States v. Independent Quick Silver Co., 72 I.D. 367, 374 (1965); United States v. Charles H. Henrikson and Oliver M. Henrikson, 70 I.D. 212, 215 (1963).

Mr. Robinette testified as to the amounts of his sales by quarters for the years 1953, 1954 and 1955. His testimony as to sales for the fourth quarter of 1953, for all of 1954, and for the first two quarters of 1955, shows a total of $1,364.41. He testified to sales of $706.88 for the third quarter of 1955, but had no idea how much of the third quarter sales were made for the period July 1 to 23, 1955. If we were to give the claimants the benefit of any doubt, and were to assume that all of the third quarter sales were made during the period July 1 to 23, 1955, this would bring their total sales over a two-year period to $2,071. This would average out to $207 per claim per year, and it is certainly reasonable to assume that not all of the $706.88 worth of sales in the third quarter of 1955 were made during the period July 1 to 23. Also, Mr. Robinette admitted that some of the sales included in his reports did come from his patented claims. Furthermore, all of the claims are 40-acre claims except one, which excludes some patented land.

Sales of $207 per year are insufficient to establish a valuable mineral discovery. In United States v. Frank Melluzzo et al., 70 I.D. 184, 188 (1963), the Department held that two sales of an uncommon variety of stone for $260 in a period of two years fall far short of establishing that the stone constitutes a valuable mineral deposit which will establish the validity of a mining claim. In United States v. Joe H. York and Jemima York, A-28806 (August 16, 1962), the mining claimants' evidence tended to show the sale of an estimated 1,000 tons of building stone from the claim during the period from the location of the claim in 1947 to July 23, 1955. In declaring the claim in that case null and void for lack of a discovery, the Department said:

> The contestees' evidence concerning sales was general and vague for apparently York kept no accurate and detailed records of his transactions. He did introduce in evidence two receipt books, which he said represented about one half of all his sales * * *. An examination of the receipts indicates sales of 44½ tons of stone for $320.00 in the years prior to 1955 and $100 or $200.00 of stone exchanged for assessment work. If these figures are doubled, the value of the stone removed from the claim in the years 1947 through 1955 would amount to approximately $1,000.00 or about $110 a year.

In view of the foregoing, the Hearing Examiner's decision of August 25, 1965, is hereby affirmed.

Amos D. Robinette and Lena S. Robinette are allowed the right of appeal to the Secretary fo the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each claim included in the appeal. If the appeal covers all five claims adversely affected by this decision, the total filing fee will be $25. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed, the appellant will have the burden of proving wherein the decision appealed from is in error.

If an appeal is taken, the adverse party to be served is:

Office of the General Counsel
U. S. Department of Agriculture
630 Sansome Street, Room 860
San Francisco, California 94111

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures (2)

DISTRIBUTION

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Office of the General Counsel, USDA
Mr. Amos D. Robinette
Mrs. Lena S. Robinette
Office of the Hearing Examiners, Sacramento, California
Regional Forester, Forest Service, USDA, San Francisco, California
Office of the General Counsel, USDA, Washington, D. C.
Forest Service, Div. of Watershed Management, USDA, Washington, D. C. (12)
Div. of L&M S&T (4)
Div. of L&M PM (2)
Appeals List No. 1
Gower Federal Service
OPD

appealed to Sec..
A-31023 affirmed 11-28-69

Mining Claims: Common Varieties of Minerals 3511

If a deposit of sand and gravel is used for the same purposes as other deposits of sand and gravel in an area, and where there is no showing that such deposit has a distinct and special value over other deposits of sand and gravel in the area, nor that there is some property of the deposit which gives it a special value for such use and that this value is reflected by the fact that the material commands a higher price in the market place, the deposit of sand and gravel is a common variety under the act of July 23, 1955.

Mining Claims: Discovery 3413

In order to satisfy the requirement for discovery on a mining claim located for common varieties of sand and gravel prior to July 23, 1955, it must be shown that the materials were extracted, removed and marketed at a profit before that date; and, where the only evidence presented by mining claimants as to the amount of material sold and the amount of profit made on such material prior to July 23, 1955, is so vague, confusing and inconclusive that it is impossible to arrive at an accurate finding, the mining claimants have failed to prove a timely discovery by a preponderance of the evidence.

Mining Claims: Generally 3400

The so-called "marketability rule," which was formulated by the Department and approved by the Supreme Court, is not such a rule as is required to be published in the Federal Register in accordance with the Administrative Procedure Act (5 U.S.C. § 552).

United States v. E. A. Barrows, Esther Barrows, and John B. Lonergan, Riverside Contest 04879 (June 28, 1968)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 JUL 19 PM 3 09

In reply refer to:
704
Riverside 04879

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

June 28, 1968

CERTIFIED MAIL
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DECISION

United States of America,
Contestant
v.
E. A. Barrows, Esther Barrows,
and John B. Lonergan,
Contestees

Involving the Grout Creek
Gravel Pit placer mining
claim located in the NE¼NE¼
of Sec. 14, T. 2 N., R. 1 W.,
S.B.M., San Bernardino
County, California (within
the San Bernardino National
Forest)

Decision Affirmed

The above-named contestees have appealed from a Hearing Examiner's decision, dated March 14, 1966, which declared their Grout Creek Gravel Pit placer mining claim null and void for the lack of a timely discovery of a valuable mineral deposit.

This proceeding was initiated by a contest complaint issued by the Bureau of Land Management at the request of the Forest Service, United States Department of Agriculture. The complaint alleged that (a) no discovery of a valuable mineral deposit was made prior to July 23, 1955; (b) the involved mineral is a "common variety" within the meaning of the Mineral Materials Act of 1947, as amended by the act of July 23, 1955; and (c) the land is nonmineral in character. The contestees filed a timely answer in which these allegations were denied.

At a prehearing conference the parties stipulated that the issues are: Whether or not sand and gravel found on the claims is a common variety and, if so, whether there is a discovery of valuable mineral deposits prior to July 23, 1955, within the purview of the mining law (Tr. 4).

The claim in issue was located on July 25, 1953. It is on the north shore of Big Bear Lake, and near the town of Fawnskin, California. The claim contains a substantial quantity of decomposed granitic material.

Emmit Ball, a Forest Service mining engineer testifying for the contestant, stated that he went over the claim with Mr. Barrows in July, 1963, after the latter had filed a verified statement. He said that Mr. Barrows told him that from the time the claim was located until 1959 he had several small sales around the lake. He would load the material by hand shovel, and he also had a customer or two who came and got their own. In 1959 Mr. Barrows leased the claim to a group of people who were going to put in a plant to wash the material and sell sand and gravel in the area of the lease. The first people went broke and the lease is now operated by the Big Bear Rock and Materials. Barrows told him that he charged something like $5 a load for the material delivered. Ball further testified that

there were other sources of material from the San Bernardino area delivered to the Big Bear area. He introduced into evidence price lists from three different suppliers. One showed prices of $5.40 per ton to Big Bear and Fawnskin and $5.60 to Big Bear City (Exh. 16). Another supplier showed a price for sand and gravel delivered at Big Bear Lake at $5.10 per ton (Exh. 17). Another price list from a supplier at Big Bear city showed prices of $5 for concrete sand, $5.50 per ton for rock, and $5.30 per ton for sand (Exh. 18).

Warren Smithson, Jr., a contractor at Big Bear Lake, testified for the contestant that he located the Lucky Strike claim in 1950 on the same area covered by the claim in issue. He used the material for concrete aggregate, for base for driveways and roads and for common fill. At the same time he was also using material from other sources for the same purpose. He said that concrete men told him that they were going to have to use other types of material, which came from San Bernardino, and which was considered a better grade. He held the claim about three years and abandoned it, telling Mr. Barrows that he had no objection to him (Barrows) claiming the area if he (Smithson) could move material in the future from the claim without charge. After Barrows claimed the land, Smithson removed about 200 yards over a period of 2 or 3 years. The material he removed was used mostly for common fill in the Fawnskin area.

Mr. Viggo B. Pedersen, who runs a sawmill and lumber yard in Fawnskin less than half a mile from the claim, testified for the contestant that he dug pits on the land encompassed by the claim and dumped sawdust in them to get rid of it. He dug pits about 10 to 12 feet wide, 8 feet deep, and 100 to 150 feet long. He commenced doing this in 1949 or 1950. He continued these disposals until about 1956, when Barrows asked him to discontinue. He dug seven pits in the area of the claim. He did not see any materials removed from the claim during this time, nor any evidence of removal. Mr. Pedersen further testified that after location of the Grout Creek claim by Mr. Barrows on July 25, 1953, he saw no appreciable change on the claim until 1956. He saw no evidence of any quantity of material being removed during 1953, 1954 and 1955 although he was on the claim often. He did not observe any large quantities of material being removed from the claim until after 1960 when a gravel and sand plant operation went in on the claim. On cross-examination he admitted that it was possible that some material may have been removed from the claim that he did not see removed.

Otis A. Smith testified for the contestant that he lives in Fawnskin very close to the claim. During the years 1953, 1954 and 1955 he walked by the claim once or twice a week, and he saw no operations on the claim nor any movement of material. On cross-examination he stated this was usually on week ends and admitted that it would have been possible for someone to have been engaged in digging and loading material during the week when he was not there.

Fred Jacobi, testifying for the contestant, stated that he owns and operates a campground just 200 to 250 yards north of the claim, and that, to the

best of his knowledge, he knew of no operations on the claim during the years 1953, 1954 and 1955.

Cecil Burton, a resident of Big Bear Lake, testified for the contestees that he has been in the ready-mix concrete and sand, excavating, grading and paving business for 15 years. He sold sand and ready-mix concrete in the Big Bear Lake area during 1953, 1954 and 1955. He had about 90 percent of the sand and gravel business in the Big Bear Lake area during those years, selling probably 100,000 to 150,000 yards a year. The remaining 10 percent was supplied by Mr. Barrows and three other parties. The sand and gravel brought $4.50 a yard delivered. He knew Mr. Barrows at that time and guessed that he was engaged in working the Grout Creek claim, but he was so busy that he didn't pay any attention to what Barrows was doing. Mr. Burton's source of material was from Holcomb Creek and he thought it was better material than from Grout Creek because it was cleaner and stronger. He made sales from his plant at $3 a yard delivered.

Werner Wirz of Big Bear Lake was in the business of selling sand, rock and fill dirt in 1953, 1954 and 1955. He obtained his materials from a pit leased from the Bear Valley Water Company. He sold sand and rock delivered at $4.00 a yard. He knew Mr. Barrows at that time, and saw him haul sand out but did not know how much he hauled. On cross-examination, Wirz stated that he has also seen Barrows with wood in his truck.

E. A. Barrows, one of the contestees, testified that he lives in Fawnskin and that he had shown an interest in the material on Smithson's claim. In 1953 Smithson told him that he was going to move and that he (Barrows) might have the location, provided that he (Smithson) could take some material from the claim without charge. After Barrows had located the claim in issue on July 25, 1953, Smithson took in excess of 200 yards from the claim. Barrows stated that he located the claim for sand and gravel, concrete materials. He had knowledge of considerable historical use of material from the claim area, including the construction of two dams. Barrows sold the material from the claim at $5 a yard delivered and at 75 cents a yard at the pit. He loaded the material for delivery by hand shoveling, and sold it to people who put in slabs, foundations or additions to homes. He also sold rock and did some work for people, charging $5 a yard for the material when he did the work.

Barrows further testified that after he located the claim, the State of California used 900 yards of the material for oil mix. As the material is a little short on rock, under a barter agreement the State left piles of rock for him in exchange for the sand they took. He did not sell any of the rock by itself, but if someone was making a foundation and wanted a little rock in the material, he put the rock in which was available from the piles of rock which the State left.

Barrows' record of sales had been destroyed. He had some sales tax reports to the State Board of Equalization for the purpose of refreshing his memory as to the amount of sales of material he had made during the years 1953,

1954 and 1955. These sales tax reports were later accepted in evidence as Exhibits H-1 through H-11. The sales of sand and gravel are not segregated in the reports, however. He estimated that he had sold 222.69 yards of material in 1953, 405 yards of sand and gravel and fill in 1954, and 291 yards in 1955. The sales tax reports show the following sales by quarters:

Second quarter		1953 -	$237.50
Third	"	1953 -	884.50
Fourth	"	1953 -	690.50
First	"	1954 -	97.50
Second	"	1954 -	407.50
Third	"	1954 -	684.50
Fourth	"	1954 -	488.00
First	"	1955 -	none
Second	"	1955 -	304.00
		Total	$3,794.00

On cross-examination he could not recall what process he went through to reach his determinations of the amounts of sand and gravel sold. He stated that there was not much in the way of building materials sold during the first and fourth quarters of each year, and that he sold some wood during the first and fourth quarters. He also sold some rock which was obtained from a source other than the claim in issue. He stated that his sales of rock and sand were about equal by volume, but that he made more money from the sale of rock at $15 a yard than he did from the sale of sand and gravel at $5 a yard. He said that the large commercial-type plant operation now on the claim started in 1960, and that from this operation he receives a price of 10 cents per ton for sand extracted, with a guaranteed minimum of $600 per year.

In his decision, the Examiner stated that the claim was located on July 25, 1953, for sand and gravel which the parties agreed were common varieties within the meaning of the Materials Act of 1947, as amended by section 3 of the act of July 23, 1955 (30 U.S.C. 611 (1964)), and not subject to location after that date, and that the remaining allegation and issue to be resolved is whether the sand and gravel on the claim constituted a valuable mineral deposit as of July 23, 1955. The appellants take exception to the Examiner's statement that the parties had agreed that the materials on the claim were common varieties, contending that they had not made such an agreement. However, the following proposed conclusion of law submitted by the contestees, and which conclusion was adopted by the Examiner, negates the appellants' contention: "(C) The material so discovered was sand and gravel of a quality equal to, if not, superior to, any sand and gravel encountered elsewhere in the Big Bear Lake area, but under the decisions of the Department the material was a common variety of sand and stone. * * *" However, be that as it may, we find that the materials are common variety materials for the reasons hereinafter given.

The Department defines "common varieties" in pertinent part in regulation 43 CFR 3511.1(b):

> "Common varieties" includes deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. * * *

The material from this claim was used for concrete aggregate, as base for driveways and roads and for common fill, the same uses to which similar materials from other sources were put to in the area. The Department has consistently held that sand and gravel suitable for road base, asphalt mix and concrete aggregate without expensive processing but which are used only for the same purposes as other widely available, but less desirable, deposits of sand and gravel, are common varieties of sand and gravel and not locatable under the mining laws since the act of July 23, 1955, _supra_, as these facts do not give them a special, distinct value. See _United States_ v. _Loyd Ramstad and Edith Ramstad_, A-30351 (September 24, 1965), and _United States_ v. _R. R. Hensler, Sr. et al._, A-29973 (May 14, 1964).

Furthermore, in a recent decision in the case of _United States_ v. _U. S. Minerals Development Corporation_, 75 I.D. ___, A-30407 (April 30, 1968) the Department held (syllabus): "To determine whether a deposit of building stone or other substance listed in the act of July 23, 1955, is of a common or uncommon variety, there must be a comparison of the deposit with other deposits of similar type minerals in order to ascertain whether the deposit has a property giving it a distinct and special value. _If the deposit is to be used for the same purposes as minerals of common occurrence, then there must be a showing that some property of the deposit gives it a special value for such use and that this value is reflected by the fact that the material commands a higher price in the market place_. If, however, the stone or other mineral has some property making it useful for some purpose for which other commonly available materials cannot be used, this may adequately demonstrate that it has a distinct and special value." (Underscoring added). Contestee Barrows obtained substantially the same price for his material as other suppliers in the area, and his material was used for the same purposes as other similar materials of common occurrence in the area. Thus, it is a common variety of sand and gravel. Therefore, the remaining issue to be decided is whether there was a discovery of valuable mineral deposits prior to July 23, 1955.

The rule of discovery was announced by the Department in _Castle_ v. _Womble_, 19 L.D. 455 (1894), and was quoted and approved by the Supreme Court of the United States in _Chrisman_ v. _Miller_, 197 U.S. 313 (1905). It reads:

> Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

With respect to nonmetallic deposits of widespread occurrence, the Department has long adhered to the rule that the material must be extracted, removed and marketed at a profit before the mineral substance may be considered a valuable mineral deposit. Layman et al. v. Ellis, 52 L.D. 714, 721 (1929). Since enactment of the act of July 23, 1955, supra, the Department has consistently held, and with judicial approval, that, in order to satisfy the requirement for discovery on a mining claim located for common varieties of sand and gravel prior to July 23, 1955, it must be shown that the materials could have been extracted, removed and marketed at a profit before that date. United States v. Loyd Ramstad and Edith Ramstad, supra; United States v. Everett Foster et al., 65 I.D. 1 (1958), which was affirmed by the United States Court of Appeals for the District of Columbia in Foster v. Seaton, 271 F. 2d 836 (D. C. Cir. 1959). In United States v. Coleman, 88 S. Ct. 1327 (1968), a case involving a common variety of building stone, the Supreme Court of the United States upheld the marketability test, stating:

> * * * The Secretary's determination that the quartzite stone did not qualify as a valuable mineral deposit because the stone could not be marketed at a profit does no violence to the statute. Indeed, the marketability test is an admirable effort to identify with greater precision and objectivity the factors relevant to a determination that a mineral deposit is "valuable." It is a logical complement to the "prudent man test" which the Secretary has been using to interpret the mining laws since 1894. * * * /citing Castle v. Womble, supra/ * * * profitability is an important consideration in applying the prudent-man test, and the marketability test which the Secretary has used here merely recognizes this fact. * * *

In a contest brought against a mining claim, the Government has the burden of establishing a prima facie case against the validity of the claim and the burden then shifts to the claimant to prove validity of the claim by a preponderance of the evidence. Foster v. Seaton, 271 F. 2d 836 (D. C. Cir. 1959).

The appellants have taken exception to the Hearing Examiner's holding that the use of sand and gravel for "filling" purposes cannot serve as the basis for the validation of a mining claim. The Examiner cited Holman v. State of Utah, 41 L.D. 314 (1912) for his authority, which is correct. See also Associate Solicitor's Opinion M-36295 (August 1, 1955).

The Examiner held that, although Mr. Barrows' evidence as to the amount of materials that he had sold from the claim is deficient for an accurate finding, it is sufficient for a finding that for the three years from 1953 through 1955 at least 600 yards of sand and gravel were removed from the claim and sold for qualifying purposes. The appellants contend that this finding completely overlooked Mr. Barrows' testimony that the State of California used 900 yards of material from the claim for oil mix and

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In a contest brought against a mining claim, the Government has the burden of establishing a prima facie case against the validity of the claim and the burden then shifts to the claimant to prove validity of the claim by a preponderance of the evidence. Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959).

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The Examiner [illegible] that although the contestees' evidence as to the amount of material that has been sold from the claim is deficient for an accurate finding, it is [illegible] finding that for the three years from 1953 through [illegible] at least 800 yards of sand and gravel were removed from the claim and sold for unspecified purposes. The appellants contend that this finding completely overlooked Mr. [illegible] testimony that [illegible] 800 yards [illegible] from the claim for oil and [illegible] paid Barrows by building up his supply of piled rock on the claim. This contention has no merit. Barrows did not sell the rock to the State. According to Barrows' own testimony he did not sell any of the rock by itself, but if someone was making a foundation and wanted a little more rock in the material, he put the rock in which was available from the piles which the State left. Thus, the rock was included in the material which he sold.

In fact, we are of the opinion that the Hearing Examiner may have been more than generous to the contestees in his finding that 600 yards of material had been sold by Barrows prior to July 23, 1955. Barrows' testimony was so vague, confusing and inconclusive that it is impossible for anyone to arrive at an accurate finding, let alone even a guess, as to the amount of material he had sold. He presented his sales tax reports showing his total dollar sales by quarters, supra, for the purpose of refreshing his memory as to amounts of material sold, but, after extensive cross-examination, he was unable to recall what process he went through to reach his determinations as to the amounts of sand and gravel that he testified to having sold during the period in question. He also sold rock which he obtained from a source other than the claim in issue, and stated that his sales of rock and sand were about equal by volume but that he made more money from the sale of rock at $15 a yard than he did from the sale of sand and gravel at $5 a yard. Furthermore, he also sold wood, and said that there was not much in the way of building materials sold during the first and fourth quarters of each year, although he sold wood during those quarters.

Even if we were to accept the Hearing Examiner's finding of 600 yards sold during the two and one-fourth years in question, it would be insufficient to prove the marketability of the material at a profit prior to July 23, 1955. As he sold some material delivered for $5 per yard and some at the pit for 75 cents a yard, there is no way of telling how much profit, if any, he made from the sale of material. In United States v. Joe H. York and Jemima York, A-28806 (August 16, 1962) the mining claimants' evidence tended to show the sale of an estimated 1,000 tons of building stone from the claim during the period from the location of the claim in 1947 to July 23, 1955. In declaring the claim in that case null and void for lack of a discovery, the Department said:

> The contestees' evidence concerning sales was general and vague for apparently York kept no accurate and detailed records of his transactions. He did introduce in evidence two receipt books, which he said represented about one half of all his sales * * * . An examination of the receipts indicates sales of 44½ tons of stone for $320.00 in the years prior to 1955 and $100 or $200.00 of stone exchanged for assessment work. If these figures are doubled, the value of the stone removed from the claim in the years 1947 through 1955 would amount to approximately $1,000.00 or about $110.00 a year.

Thus, the contestees failed to establish the validity of their claim by a preponderance of the evidence.

The appellants take exception to a statement by the Hearing Examiner that the value of the material on the claim according to the current lease is 10 cents a ton or approximately 13.4 cents a yard, contending that, in so doing, he overlooked the testimony that Barrows sold material at the claim pit for 75 cents a yard, with buyers doing their own loading. We do not think that the royalty provided for by a lease entered into several years after 1955 has any relevancy to the actual value of the material preceding 1955, particularly in view of Mr. Barrows' testimony that he sold material at the pit for 75 cents a yard, with buyers doing their own loading. Accordingly, the Examiner's decision is modified to that extent. However, this modification in no way affects our holding in this decision.

The appellants assert that the Supreme Court's decision in United States v. Coleman, supra, does not require the mineral claimant to be in the market or to be extracting and selling the mineral profitably. In support of this assertion, they argue that the Court spoke of profitability as an important consideration in applying the prudent man test, and that it is clear from the Court's opinion that the showing the claimant should make is that the sand and gravel can be marketed at a profit, not that they actually were. We disagree with this contention. Although the Court in Coleman used the words "can be extracted, removed and marketed at a profit," the Court was affirming the Department's decision, and a thorough reading of the Department's decision will reveal that it intended that actual sales at a profit from a particular claim or claims must be demonstrated. The Department said "* * * it is abundantly clear that there was no marketing of any products from these claims in 1955 or even in 1958 when the hearing was held. Coleman presented evidence of sales from the four claims upon which the bulk of his improvements were placed. However, he admitted that he did not make any profit on his rock sales." The Department further stated: "He /Coleman/ was required to show that by reason of all pertinent factors, including the existence of a present demand before July 23, 1955, the deposit upon which his claim of discovery was based could be mined, removed and disposed of at a profit." Furthermore, in his opinion on the Marketability Rule, 69 I.D. 145, 146 (1962), the Solicitor of the Department said:

> An intrinsically valuable mineral by its very nature is deemed marketable, and therefore merely showing the nature of the mineral usually meets the test of marketability. On the other hand, where we are concerned with a nonmetalic mineral found in a great many places, application of the prudent man test requires that a market for the mineral be shown by the locator. The extreme example is probably sand and gravel, which are found in every State. There is a demand for sand and gravel, but in many areas the available deposits far exceeds the market. In

> such cases we must insist that the locator show that there is a market actually existing for his minerals. To validate any sand and gravel claim proof of present marketability must be clearly shown. (Underscoring added).

The appellants further assert that the marketability rule is an interpretation of general applicability formulated and adopted by the agency, and, as it was not published in the Federal Register as required by the Administrative Procedure Act (5 U.S.C. § 552), it is not binding upon them. This same point was urged upon the Supreme Court, inter alia, by the respondents in United States v. Coleman, supra, in their petition for rehearing in that case. Rehearing was denied by the Supreme Court on May 27, 1968. Therefore, the appellants' contention is without merit.

The appellants expressed the belief that the case is important enough to justify oral argument. The appellants have not been limited in their right to submit their contentions on appeal. After careful consideration it is not believed that oral argument would be of any particular usefulness in this case. Therefore, the request for oral argument is denied.

Accordingly, the Hearing Examiner's decision is hereby affirmed.

E. A. Barrows, Esther Barrows and John B. Lonergan are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

If an appeal is taken, the adverse party to be served is:

Office of the General Counsel
U.S. Department of Agriculture
630 Sansome Street, Room 860
San Francisco, California 94111

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2
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Mr. E. A. Barrows
Mrs. Esther Barrows
Office of the Hearing Examiners, Sacramento
Regional Forester, Forest Service, U.S. Department of Agriculture
Office of the General Counsel, U.S. Department of Agriculture
Forest Service, Division of Watershed Management, U.S. Department of Agriculture (12)
Adm. Asst., Hearings
Div. of L&M S&T (4)
Div. of L&M PM (2)
Appeals List No. 1
Gower Federal Service
OPD

Mining Claims: Common Varieties of Minerals 3511

If deposits of decomposed granite and building stone are used for the same purposes as other deposits of similar materials in an area, and where there is no showing that such deposits have a distinct and special value over other deposits of decomposed granite and building stone in the area, nor that there is some property of the deposits which gives them a special value for such uses and that these values are reflected by the fact that the materials command a higher price in the market place, the deposits of decomposed granite and building stone are common varieties under the act of July 23, 1955.

Mining Claims: Discovery 3413

In order to satisfy the requirement for discovery on a mining claim located for common varieties of mineral materials prior to July 23, 1955, it must be shown that the materials were extracted, removed and marketed at a profit before that date; and where the evidence presented by mining claimants shows gross sales over a 10-year period preceding July 23, 1955, of decomposed granite averaging $518 a year, and of building stone averaging $239 a year, without any evidence as to operating costs or as to whether a profit was made, the mining claimants have failed to prove timely discoveries on the claims by a preponderance of the evidence.

United States v. Ann H. Stewart, J. Putnam Henck, Individually, as Conservators of the Estate of Mary P. Henck, Deceased, and as Trustees Under the Will of J. E. Henck, Deceased, Riverside 04883 (July 22, 1968)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 AUG 6 PM 2 49

In reply refer to:
704
Riverside 04883

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

July 22, 1968

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America
Contestant
v.
Ann H. Stewart, J. Putnam Henck,
Individually, as Conservators of
the Estate of Mary P. Henck,
Deceased, and as Trustees Under
the Will of J. E. Henck, Deceased,
Contestees

Involving the Skyforest and Skyforest
No. 1 mining claims located within
the NW¼NE¼ and the NE¼NE¼ of Sec. 26,
T. 2 N., R. 3 W., S.B.M., San Bernardino
County, California (within the San
Bernardino National Forest)

Decision Affirmed

The above-named contestees have appealed from a Hearing Examiner's decision dated May 24, 1965, which declared their Skyforest and Skyforest No. 1 mining claims null and void for the reason that there has not been a timely discovery of a valuable mineral deposit on either of the claims.

The contest proceeding was initiated by a complaint issued by the Acting Manager of the Riverside, California, land office at the request of the Forest Service, United States Department of Agriculture. The complaint contained the following allegations: (a) Neither claim is supported by the discovery of a mineral deposit within the meaning of the mining laws; (b) The involved material is a "common variety" within the meaning of the Mineral Material Act of 1947, as amended by the act of July 23, 1955; and (c) The land is nonmineral in character.

The contestees filed a timely answer to the complaint in which they denied the allegations, and a hearing was held at Los Angeles, California, on January 26, 1965.

The location notices for both claims were recorded on August 29, 1946. The claims are located near Lake Arrowhead. The Skyforest claim was located for stone used in the construction of fireplaces, patios and walls. The Skyforest No. 1 claim was located for decomposed granite or gravel, which has been used for road and driveway fills and as an ingredient of a road surfacing material.

The contestant's witness was Emmett B. Ball, Jr., a duly qualified Forest Service mining engineer. He testified that he has been on the claims several times, the first being in August or September, 1962. His next visit to the claims was in July, 1963, with Mr. Henck and Mr. Stewart, who pointed out the works on the Skyforest No. 1 claim, and showed him where building stone had been taken out from the Skyforest claim. He has been on the claims several times since his visit with Mr. Henck and

Mr. Stewart. He introduced photographs which he had taken of the pit on the Skyforest No. 1 claim in 1964, and one taken of the same pit in 1955, and he stated that he could see very little change in the pit over that period of time. He took pictures of the two claims of areas that were pointed out to him as having been worked at one time, either for building stone or decomposed granite. The building stone that was removed was a granitic-type rock which is very common all through the mountains. The decomposed granite on the Skyforest No. 1 claim is widespread throughout the general area. He investigated uses of the materials from the claims in the area and found that the stone is used for curbs along driveways, fireplaces, rock walls and patios, while the decomposed granite is used for filling and surfacing driveways, and for filling lots.

Mr. Ball introduced in evidence (Exh. 16) a list that the claimants had given him showing the yearly sales from 1946 through 1958 of decomposed granite from the Skyforest No. 1 claim, and of building stone from the Skyforest claim. This list showed a total of 85 cubic yards of decomposed granite sold during each of the years 1957 and 1958. The claimants told him that these 85 yards a year were removed for the assessment work. The claimants said that they had not sold any building stone after 1957 but that they were going to try to get in the market again. He expressed an opinion that a prudent man would not be justified in devoting time, effort and money on these claims with the hope of developing a paying mine. On cross-examination, he explained the bases for arriving at this opinion are that there is not enough market for building stone, the building stone is not plentiful enough to get a large operation going, and the sales for decomposed granite are sporadic as evidenced by the past production figures.

Mr. Richard S. Stewart, the husband of Ann Stewart, one of the contestees, testified for the contestees, that he has been familiar with the property since 1957, and that he is familiar with the claim records for the prior years when Mr. Joseph Henck owned the claims. He stated that the inplace value of the gravel or decomposed granite on the Skyforest No. 1 claim was between 5 cents and 7 cents a cubic yard, but that they obtained $2 for the gravel delivered and $6 for the building stone delivered. He introduced as Exhibit A a record showing the sales from the claims by years from 1946 to 1958. The sales are as follows:

Year	Gravel	Gross Price of Gravel	Stone	Gross Price of Stone
1946	63 yds.	$136.00	30 yds.	$ 90.00
1947	153 yds.	306.00	15 yds.	90.00
1948	167 yds.	334.00	11 yds.	66.00
1949	365 yds	730.00	40 yds.	240.00
1950	231 yds.	462.00	49 yds.	294.00
1951	153 yds.	306.00	71 yds.	426.00
1952	256 yds.	512.00	63 yds.	378.00
1953	456 yds.	912.00	23 yds.	138.00
1954	362 yds.	624.00	63 yds.	368.00
1955	531 yds.	862.00	51 yds.	306.00
1956	143 yds.	286.00	53 yds.	318.00
1957	85 yds.	170.00	21 yds.	126.00
1958	85 yds.	170.00	none	none

He introduced as Exhibit B a record showing sales for the years 1959 to 1964, as follows:

Year	Gravel	Gross Price of Gravel	Stone	Gross Price of Stone
1959	110 yds.	$236.00	none	none
1960	120 yds.	280.00	30 yds.	$98.00
1961	240 yds.	466.00	none	none
1962	90 yds.	216.00	none	none
1963	250 yds.	496.00	20 yds.	60.00
1964	10 yds.	24.00	10 yds.	30.00

Mr. Stewart testified that the purchasers of the stone had used it for fireplaces, ornamental walls and patios. He has not engaged in any marketing efforts during the past five years but just takes orders and waits until he gets enough orders for three or four days' work. The decomposed granite or gravel was used mostly for driveway fill. Until the summer of 1957 rock was taken from the northwest quarter of the Skyforest claim. At that time they discovered a prettier rock in the southwest quarter of the claim. Substantially all of their removals of decomposed granite have been from the northeast quarter of the Skyforest No. 1 claim. They use a skiploader and a truck for loading and delivering the material, and they haul the material within a radius of 45 miles. They also dig the stone out with the skiploader and load the truck with it. They blast the rock where they cannot get it out with the skiploader, and where the pieces of rock are too big to handle they break them into smaller pieces with a hand-operated rock hammer before loading them. Mr. Stewart did not know what their production and operating costs would be.

Mr. Jack Yeager, a general contractor, testified for the contestees. He is familiar with the Skyforest No. 1 claim and the decomposed granite on it, and he has had the materials tested by a laboratory to see if they meet specifications for state and county highway projects and for schools. The materials were found to be qualified for these purposes. He was familiar with other sources of similar materials in the area surrounding the claims in issue, but the other sources were unacceptable to him for various reasons such as lower quality material or they are uneconomical to operate because of remoteness and steep grades, or the deposits are located on private lands and unavailable.

Mr. Yeager has recently secured a contract to construct a state highway interchange, and he believes that the area is ready for an asphalt plant. He has been negotiating with the contestees to put in an asphalt plant on the Skyforest No. 1 and to purchase material at a price of 10 cents per ton, and he estimates that he can use approximately 20,000 tons a year for several years.

The rule of discovery was announced by the Department in Castle v. Womble, 19 L.D. 455 (1894), and was quoted and approved by the Supreme Court of the United States in Chrisman v. Miller, 197 U. S. 313 (1905). It reads:

> Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

With respect to nonmetallic deposits of widespread occurrence, the Department has long adhered to the rule that the material must be extracted, removed and marketed at a profit before the mineral substance may be considered a valuable mineral deposit. Layman et al. v. Ellis, 52 L.D. 714, 721 (1929). Since enactment of the act of July 23, 1955, 30 U.S.C. §§ 611-615 (1964), the Department has consistently held, and with judicial approval, that, in order to satisfy the requirement for discovery on a mining claim located for common varieties of sand and gravel prior to July 23, 1955, it must be shown that the materials could have been extracted, removed and marketed at a profit before that date. United States v. Loyd Ramstad and Edith Ramstad, A-30351 (September 24, 1965); United States v. Everett Foster et al., 65 I.D. 1 (1958), which was affirmed by the United States Court of Appeals for the District of Columbia in Foster v. Seaton, 271 F. 2d 836 (D. C. Cir. 1959). The Department has also held that it is not only necessary to prove a valid discovery prior to or as of July 23, 1955, but it is also necessary to prove that a claim retains its validity because a valuable mineral discovery remains within the claim. See United States v. Independent Quick Silver Company, 72 I.D. 367, 380 (1965). In United States v. Coleman, 390 U.S. 599 (1968), the Supreme Court of the United States upheld the Department's marketability test, calling it a logical complement to the "prudent man test."

In a contest brought against a mining claim, the Government has the burden of establishing a prima facie case against the validity of the claim, and the burden then shifts to the claimant to prove validity of the claim by a preponderance of the evidence. Foster v. Seaton, supra.

The Department defines "common varieties" in pertinent part in regulation 43 CFR 3511.1(b):

> "Common varieties" includes deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. Mineral materials which occur commonly shall not be deemed to be "common varieties" if a particular deposit has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation. In the determination of commercial value, such factors may be considered as quality and quantity of the deposit, geographical location, proximity to market or point of utilization, accessibility to transportation, * * *.

In their appeal, the appellants quoted this regulation, supplying emphasis to the words "commercial value, geographical location, proximity to market or point of utilization, and accessibility to transportation." They contend that the materials on the subject claims are commercially valuable because they are readily available and accessible to potential and actual users in the area, whereas similar materials on other properties are remote or otherwise actually unavailable for development, and, for these reasons, they assert that the materials are uncommon varieties. However, in so doing, they overlook the first sentence of the regulation to the effect that common varieties includes deposits which, "although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits." The evidence indicates that the stone from the Skyforest claim was used for fireplaces, patios, ornamental walls and for curbs along driveways, while the decomposed granite from the Skyforest No. 1 was used for road and driveway fills, an ingredient of a road surfacing material and for common fill for lots. Such uses do not give the materials a distinct, special economic value over and above the normal uses of other similar materials, even though the deposits on the claims in issue may be of a better quality or more conveniently located. The Hearing Examiner correctly pointed out in his decision that:

> * * * the Department has consistently held that materials of superior quality which can be produced advantageously but which are used only for the same purposes as other less desirable deposits of the same materials are common varieties of material and are not locatable under the mining laws since these advantages do not give them a special distinct value. United States v. J. R. Henderson, 68 I.D. 26, 29-30 (1961); United States v. D. G. Ligier et al., A-29011 (October 8, 1962); United States v. Kelly Shannon et al., 70 I.D. 136, 141 (1963); United States v. J. R. Cardwell and Frances H. Smart, A-29819 (March 11, 1964); United States v. R. R. Hensler, Sr., et al., A-29973 (May 14, 1964); United States v. Kenneth McClarty, 71 I.D. 331 (1964).

Furthermore, in a recent decision in the case of United States v. U. S. Minerals Development Corporation, 75 I.D. ___, A-30407 (April 30, 1968) the Department held (syllabus): "To determine whether a deposit of building stone or other substance listed in the act of July 23, 1955, is of a common or uncommon variety, there must be a comparison of the deposit with other deposits of similar type minerals in order to ascertain whether the deposit has a property giving it a distinct and special value. If the deposit is to be used for the same purposes as minerals of common occurrence, then there must be a showing that some property of the deposit gives it a special value for such use and that this value is reflected by the fact that the material commands a higher price in the market place. If, however, the

stone or other mineral has some property making it useful for some purpose for which other commonly available materials cannot be used, this may adequately demonstrate that it has a distinct and special value." (Emphasis supplied.) There was no evidence as to what prices similar materials commanded in the area, but $2 per cubic yard for decomposed granite and $6 per cubic yard for building stone delivered are not high prices and it is reasonable to assume that they are in line with the prevailing prices for similar materials in the area.

The appellants further contend that the deposits on the claims constitute deposits which are commercially valuable and sufficient to support the validity of the claims. In reviewing the evidence, we do not believe that discoveries of valuable mineral deposits on the claims as of July 23, 1955, were established by the claimants by a preponderance of the evidence.

The Department has held that there must be a discovery of a valuable mineral deposit within the limits of each claim, and that a discovery on one claim does not inure to the benefit of an adjoining claim. See United States v. Independent Quick Silver Co., supra; United States v. Charles H. Henrickson and Oliver M. Henrikson, 70 I.D. 212, 215 (1963).

The claimants' evidence showed total gross sales of gravel from the Skyforest No. 1 claim of $5,184 over the 10-year period from 1946 to 1955, or an average of $518 a year. Similarly, their evidence showed total gross sales of rock from the Skyforest claim over the same period of $2,396, or an average of $239 a year. Furthermore, the claimants presented no evidence as to whether any profits were made on these sales. Considering labor, and the maintenance, upkeep and operation of the skiploader and truck, it is reasonable to assume that a substantial part of the gross sales price was absorbed by these costs. We hold that such sales are insufficient to establish a discovery of valuable minerals as of July 23, 1955. In United States v. Frank Melluzzo et al., 70 I.D. 184, 188 (1963), the Department held that two sales of an uncommon variety of stone for $260 in a period of two years falls far short of establishing that the stone constitutes a valuable mineral deposit which will establish the validity of a mining claim. Also see United States v. Joe H. York and Jemima York, A-28806 (August 16, 1962).

Even if we were to assume that the claimants had proven a discovery as of July 23, 1955, which is not the case here, sales have fallen off considerably since 1955, with average sales of decomposed granite of $260 a year, and of rock of only $70 a year. This would hardly constitute evidence of an existing valuable mineral deposit. See United States v. Independent Quick Silver Company, supra.

In view of the foregoing, the Hearing Examiner's decision of May 24, 1965, is hereby affirmed.

The above-named contestees are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840.

See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each claim included in the appeal. If the appeal covers both claims adversely affected by this decision, the total filing fee will be $10. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed, the appellant will have the burden of proving wherein the decision appealed from is in error.

If an appeal is taken, the adverse party to be served is:

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Francis A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

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Adm. Asst., Hearings
Div. of L&M S&T (4)
Div. of L&M PM (2)
Appeals List No. 1
Gower Federal Service
OPD

Appeal to Sec

affirmed

A-31050

4-3-70

Mining Claims: Discovery 3413

Where mining claimants have offered no probative evidence of the existence of any specific vein or lode of mineralized rock in place, exposed on any of the contested lode mining claims, which bears sufficient mineral values to justify a person of ordinary prudence in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the claims, lacking a discovery, are properly declared null and void.

The discovery required by the mining laws means more than a showing only of isolated bits of mineral not connected with or leading to substantial values.

With respect to nonmetallic deposits of widespread occurrence, such as clay and building stone, the materials must be extracted, removed and marketed at a profit before the mineral materials may be considered a valuable mineral deposit; and, where the record clearly shows that the mining claimants have not sold any of these materials from their claims, the claims are properly declared null and void for the lack of a discovery of a valuable mineral deposit.

United States v. Lester E. Martin et al., LA Contests 0170969-C-40, 41, 43, and 44 (August 2, 1968)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 AUG 15 AM 10 00

In reply refer to:
704
LA 0170969-C-40, 41, 43, 44

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

August 2, 1968

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DECISION

United States of America, Contestant v. Lester E. Martin, J. A. Tinsley, Jr. and Heirs and Devisees of J. A. Tinsley, Sr., deceased; and other unknown owners, Contestees	:	Involving the North Star and North Star No. 1 lode mining claims; the Gold Hill, Gold Hill No. 1 and Gold Hill No. 2 lode mining claims; the Beautifier and White Flagstone Quarry placer mining claims; and the Condor No. 2 and Condor No. 3 lode mining claims, all located in San Bernardino County, California

Decision Affirmed

Lester E. Martin and J. A. Tinsley, Jr. have appealed from a Hearing Examiner's decision, dated January 12, 1966, which declared the above-named mining claims null and void because each one of the claims lacks a discovery of a valuable mineral deposit.

This combined proceeding was initiated by the issuance of four contest complaints by the Manager of the Riverside, California, land office of the Bureau of Land Management. All of the complaints contained the following allegations with respect to the claims: A. The land embraced within the claims is non-mineral in character, and B. Minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery. The complaint in Contest No. LA 0170969-C-43, involving the two placer mining claims, contained the following additional allegations: (a) No discovery of a valuable mineral or material has been made within the limits of the claims because the mineral materials present cannot be marketed at a profit, and (b) It has not been shown that there exists an actual and substantial market for these materials.

Civil Action No. 3129-PH, condemning a leasehold estate in the lands covered by subject claims and Civil Action No. 769-60Y, condemning a leasehold estate in the claimant's possessory interest therein, for use by the Department of the Navy in connection with its Mojave "B" Gunnery Range, have been filed in the United States District Court for the Southern District of California, Central Division, at Los Angeles. Orders of immediate possession to the estates condemned were entered in the proceedings on September 2, 1943, and June 30, 1960, respectively. The lands, at all times since September 2, 1943, have been under the jurisdiction of the Department of the Navy.

Hearings were held on May 21 and 25, 1965, at Los Angeles, California, to afford the parties an opportunity of presenting evidence and of examining and cross-examining witnesses.

The claims in issue were located in the years 1934, 1935, 1937, 1938 and 1939. The location certificate of the White Flagstone Quarry claim has not been recorded.

Edward F. Cruskie, a duly qualified mining engineer employed by the Bureau of Land Management, testified for the contestant that he examined the subject claims on October 13, 1960, and October 7, 1961, accompanied by Mr. Martin who showed him the workings and identified the claims in every case.

Mr. Cruskie stated that along the common end line of the Condor No. 2 and Condor No. 3 there is a cluster of shallow pits ranging from three to eight feet deep on minor sheared zones showing some manganese stain and clay seams. On the North Star and the North Star No. 1 the workings are also confined to the common end line. About 20 feet west of the common end line is a discovery pit on the North Star No. 1. Another discovery pit on the North Star showed a three-foot wide stringered zone. About 100 feet southwest of these discovery pits is the largest excavation of the group. It is near the end line on the North Star and is about 25 feet by 20 feet and about 12 to 15 feet deep. On the Gold Hill group, most of the working was done on the Gold Hill No. 2 claim. Near the location monument of the Gold Hill No. 2 there is a trench 60 feet long, 10 to 15 feet wide and 10 to 15 feet deep in places. Just northeast of the location monument there is a shallow pit about three feet deep. Southeast of the location monument there are three pits about 7 or 8 feet deep, inclines on the stringered vein zones. One of these pits falls close to the line but is apparently on the Gold Hill claim. On the east sideline of the Gold Hill No. 1 claim, there is a shallow trench about a foot deep and about 100 feet long, which was dug in soil material and seems to be very old. On the White Flagstone Quarry claim there is an outcrop of arkosic sandstone beds about 20 feet thick, but it is not positive that there was any digging there because of the nature of the material.

Mr. Cruskie took samples from the claims and had them assayed. Sample NS-1, cut across the stringered zone in the 60-foot discovery cut on the North Star No. 1, had a combined value in gold and silver of $1.88 per ton. Sample NS-1-1, which was a 6-foot wide cut from the assessment cut on the North Star, had a combined value of $8.97 in gold and silver per ton. Sample NS-1-2, an 8½-foot width cut on the prolongation of NS-1-1, assayed at $1.37 per ton in gold and silver. Sample NS-1-3, cut over a 3-foot width across the stringered zone in the discovery cut on the North Star No. 1, assayed at $1.04 per ton in gold and silver. Mr. Cruskie

testified with respect to the higher value sample of $8.97 that "a little exploration is warranted." Eleven samples were taken from the Gold Hill and Gold Hill No. 2 claims. These samples had combined gold and silver values per ton of $2.74, $6.74, $0.32, $0.65, $1.62, $0.89, $0.63, $0.21, $0.28, $0.96, and $0.59. Four samples taken from the Condor Nos. 2 and 3 claims showed values of .005 oz. or less of gold per ton, .24 oz. or less of silver per ton, .05% or less of copper, .27% or less of lead, .03% or less of molybdenum trioxide, .01% or less of vanadium pentoxide, .006% or less of uranium oxide, and a trace of tungstic oxide.

Counsel for the contestees stipulated that no material was sold by the contestees from the Beautifier and White Flagstone Quarry placer claims prior to the time the claims were taken over by the Navy in 1943, as the claims were being held for future prospects (Tr. 47). A clay deposit is on the Beautifier placer, and a deposit of stone is on the White Flagstone Quarry placer.

Mr. Cruskie expressed his opinion that the materials on the Beautifier and White Flagstone Quarry claims could not be marketed at the present time or even in the past; that the materials on these two claims do not possess any special distinct characteristics which would make them unique, unusual or distinct in any way, and the materials are widespread; and that there is no discovery on any of the claims in issue within the meaning of the mining laws. He stated that the one sample on the North Star claim would warrant a little exploration, but that in itself is not conclusive as the mineralization is erratic and none of the samples, even the particular one from the North Star, indicates that there is any ore chute possibility in any of the veins.

Lester E. Martin, one of the contestees, testified that he sold three tons of ore from the Gold Hill No. 2 claim. Two of the tons were delivered to the Diak Mill in Dagget for which he received $94 and $110. The third ton was delivered to the Dagget Mill, but he did not mention the price received for it. His son dug a half ton of ore, which was taken to Burton Brothers in Rosemont. His son's wife got a $20 down payment on this ore, which was all they got out of it. He was present on the Gold Hill No. 2 when the contestant's mining engineer took samples. The wind was blowing pretty hard at the time and about two feet of rock covered the vein at the bottom of the cut. He had taken most of the gold ore out of these particular spots, and the vein had narrowed down to about three or four inches. He took one ton of ore from the Gold Hill claim and milled it at his mill. The assay value was $24 per ton. A 65-foot cut on the Gold Hill No. 2 averaged $4 a ton in gold and silver. He dry-washed 25 to 30 yards of placer material on the Gold Hill No. 2 which ran around $2.80 a yard in gold and silver. He purchased supplies at a mercantile store with the placer gold that he recovered. He took two samples from a 16-foot cut trench, which assayed $10.80 and $12.20 a ton. He had expected to mine about 10 to 12 tons of ore a day from the North Star and Gold Hill claims, stating that his mill would handle that amount.

Mr. Martin stated that he lived on the Condor No. 2 for three years, 1935, 1936 and 1937, and that he dug a trench on the Condor No. 2 but did not discover any gold, silver or any other minerals there. He said that the primary purpose of the Condor No. 2 was for the cabin site, and, for the Condor No. 3 was to develop water for a mill which he intended to put on that claim. He dug a tunnel from which he developed 2 inches of water, but he did not do any other discovery work on the Condors Nos. 2 and 3. He never marketed any clay from the Beautifier, nor has he ever sold any rock from the White Flagstone Quarry claim.

On cross-examination, Mr. Martin stated that he had produced 3½ tons of ore from the Gold Hill claim, none was taken from the Gold Hill No. 2, none was sold from the North Star although he took a ton of ore therefrom to a mill at Hughs Lake, but the returns he received from the mill were not the returns for his ore, and that he has no idea what value may have been on the North Star. He did not sell any ore from the North Star No. 1 but he had assays run from that claim which averaged $8.40 a ton. He stated that he did not sell any more ore from the Gold Hill because he had no mill at the time and the mill in Dagget had closed down after the owner had been killed. There is still a vein of ore there, but it narrowed down to about 2½ to 4 inches wide, and the amount of tons still in the vein would have to be determined by drilling. He said that the deeper he went the higher the gold values got, but the narrower the vein got. He could not produce the assay reports referred to in his testimony because he had lost them.

To constitute a valid mining claim, there must be such a discovery of valuable minerals as would warrant a prudent man in the expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. *Castle* v. *Womble*, 19 L.D. 455 (1894); *Chrisman* v. *Miller*, 197 U.S. 313 (1905); *United States* v. *Ford M. Converse*, 72 I.D. 141 (1965).

The discovery required by the mining laws means more than a showing only of isolated bits of mineral not connected with or leading to substantial values. *United States* v. *Josephine Lode Mining Development Company*, A-27090 (May 11, 1955); *United States* v. *Richard L. and Nellie V. Effenbeck*, A-29113 (January 15, 1963); *United States* v. *John L. Cooper et al.*, A-30267 (May 11, 1965). Furthermore, in *United States* v. *C. F. Pruess, et al.*, A-28641 (August 22, 1961), the Department held (syllabus): "Reports of assays showing that occasional samples of material from lode mining claims contain high values for gold are not conclusive evidence of a valid discovery but *other relevant factors are to be considered, such as the extent of the mineral deposits on the claims* and the number of samples of material assayed from the claims showing only a trace or no mineral values in determining whether a discovery of valuable minerals has been made." (Emphasis added).

A prudent man may be justified in doing further exploratory work in the hope of finding a discovery. However, a valid discovery under the mining law requires more than a finding of mineral indications which would not warrant development work but only further exploratory work to determine if a valuable mineral deposit exists in a claim. United States v. George C. Johnson and Robert A. Johnson, A-30603 (October 25, 1966); United States v. O. Kenneth Smith, A-30626 (December 15, 1966). In the Cooper case, supra, the Department said: "The Department has held that there is a distinct difference between exploration and discovery under the mining laws. Exploration work is that which is done prior to a discovery in an effort to determine whether the land contains valuable minerals. It is only when the exploratory work shows that minerals exist in such quantities and such values that there is a reasonable prospect of success in developing a paying mine that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made. United States v. Clyde R. Altman and Charles M. Russell, 68 I.D. 235 (1961)."

With respect to nonmetallic deposits of widespread occurrence, such as the clay and stone on the Beautifier and White Flagstone Quarry placer claims, the Department has long adhered to the rule that the material must be extracted, removed and marketed at a profit before the mineral substance may be considered a valuable mineral deposit. Layman et al. v. Ellis, 52 L.D. 714, 721 (1929). Also see the recent decision in United States v. Coleman, 390 U.S. 599 (1968), in which the Supreme Court of the United States affirmed the Department's marketability test, calling it a logical complement to the "prudent man test."

The area embracing the claims was withdrawn from further occupation and location pursuant to the general mining laws by the actual possession of the land by naval personnel on September 2, 1943, the date of issuance of the order of immediate possession in condemnation by the Court. United States v. Grace E. Hutchins et al., Los Angeles Contest 0170969-C-3 and C-4 (December 22, 1964), approved by the Under Secretary of the Interior on January 8, 1965. Thus, any discovery of valuable minerals must have been made before that date.

The burden of proof as to a discovery is first upon the Government to establish a prima facie case as to non-discovery, and the burden then shifts to the mining claimant to establish the validity of his claim by a preponderance of the evidence. Foster v. Seaton, 271 F. 2d 836 (D. C. Cir. 1959).

In carefully reviewing the evidence adduced at the hearing in the light of these governing principles of law, we find that the record clearly shows that there have been no discoveries of valuable minerals within the meaning of the mining laws on any of the claims in issue. The record

is definite that the contestees have never sold any clay or building stone from the placer claims, and the Beautifier and White Flagstone Quarry placer mining claims are, therefore, null and void. As for the lode mining claims, the Hearing Examiner has correctly held:

> The testimony of the contestant's witness, based upon a recent comprehensive sampling of the claims, clearly shows that the veins or stringer zones exposed on the lode claims are narrow, limited in lateral extent, and contain insufficient mineral values to warrant further development. The said testimony, supported by assay reports of representative samples taken from various exposures, is sufficient to establish, prima facie, that a valuable mineral deposit has not been exposed on any of the contested lode claims.
>
> The testimony of the contestees' witness indicates that some ore was shipped from the Gold Hill claims in 1936. However, the witness indicated that one of the veins from which the ore was removed had narrowed to a width of 4 inches or less. All of his testimony with respect to the ore shipments and alleged assay values was from memory and not supported by any documentary evidence whatever. The said testimony, unsupported by any documentary evidence, is insufficient to overcome the prima facie case established by the contestant. The contestees have not identified a single vein exposed on any of the lode claims, bearing sufficient mineral values, and occurring in such width and lateral extent, as to warrant development.
>
> It is concluded that the contestees have offered no probative evidence of the existence of any specific vein or lode of mineralized rock in place, exposed on any of the contested lode claims, which bears sufficient mineral values to justify a person of ordinary prudence in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine.

Appellants conceded that there is no testimony as to the value of the White Flagstone Quarry placer claim, and as to the values of the Condor Nos. 2 and 3 lode claims, but stated that they did claim Condor No. 2 as a cabin site and Condor No. 3 as a millsite, as the site was intended to be used for milling and mining purposes. The mere use of a lode mining claim for a cabin site will not validate the claim, nor will the mere intention to use a lode mining claim as a millsite. If a millsite was intended it should have been located in accordance with the provisions of the mining laws pertaining to millsites.

The appellants argued that the Gold Hill, Gold Hill No. 1, Gold Hill No. 2, North Star and North Star No. 1 claims had sufficient mineral values to validate them and they should not be held to be null and void because the value of the dollar in 1943 was about one-third of what it is today, while the price of gold has remained constant, and that the values attested to by the witnesses should be multiplied approximately three times to determine what the value was in 1943. This argument is specious, to say the least, and the appellants have cited no authority to support it, nor did they offer any evidence at the hearing in this respect.

The appellants further argued that the hearing should be set aside on the ground that they were never afforded an opportunity to visit and inspect and to take an expert to the claims, although numerous requests were made to do so. In support of this argument they cited the following requests that were made by their attorney: Letter of February 22, 1962, addressed to Mr. George F. Hurley, Assistant United States Attorney, Los Angeles; letter of March 30, 1962, addressed to the same individual; letter of March 30, 1962, addressed to the Chief Counsel, Land Office Division, Los Angeles; letter of December 24, 1964, addressed to the Hearing Examiner; and letter of May 4, 1965, also addressed to the Hearing Examiner. The first three requests were made approximately two years before the contest complaints were issued in these proceedings, and the record does not reflect what action, if any, was taken on them, or if they were actually received by the addressees.

The hearing on these cases was originally scheduled to be held on January 14, 1965. The letter of December 24, 1964, from the contestees' attorney to the Hearing Examiner was a request for a continuance of the hearing because of conflicting court cases with the further request: "We would respectfully request a continuance until June of 1965 so that we may go out with our own geologist and take assays at the sites involved. I have not had the funds to pay a geologist until now nor has my client." As a result, the Examiner postponed the hearing without date. On March 23, 1965, the Examiner rescheduled the hearing for May 21, 1965. The letter of May 4, 1965 from the contestees' attorney to the Hearing Examiner requested a further postponement of the hearing, stating:

> We have not had the money or the opportunity to visit the mining claims and until that has been done do not feel that we can adequately represent the contestees. We respectfully request, therefore, that the matter be taken off calendar.
>
> I shall be in trial constantly for the next three weeks and have a case commencing on May 17 which will no doubt last through May 21. As soon thereafter as it is possible and I have been able to make arrangements to visit the claims, I will inform you.

On May 7, 1965, the Hearing Examiner denied the request for postponement for lack of sufficient grounds, stating "In the event that the court case which you have scheduled to commence on May 17th should continue through May 21st, this contest could, on proper motion, be postponed until May 24th or 25th."

At the outset of the hearing the contestees' attorney moved for a continuance. He said:

> Your Honor, we have a preliminary motion for continuance for our side of the case based primarily on lack of funds with which to employ a mining engineer or geologist, and secondly, I have a letter in my file dated March 30, 1962, addressed to the Chief Counsel, Land Office Division, Los Angeles, California, asking an opportunity to visit the claims and attempting to make arrangements to visit the claims. I am not sure that this letter ever reached the office. They never followed it up. I wanted to point out to the Court that I have it, but my client has very limited funds. I told him that as soon as I am able, we will employ a mining engineer or geologist. * * * (Tr. 5, 6).

The motion was denied by the Examiner, and we do not think that there was any abuse of discretion on his part in denying the motion. From this record it does not appear that the contestees pursued their requests to examine the claims with reasonable diligence. Moreover, the attorney's letter of May 4, 1965, to the Hearing Examiner and his oral motion made at the hearing indicated that the contestees did not have the money to employ a mining engineer or geologist to examine the claims. We find no error in the Hearing Examiner's denial of the motion for an indefinite continuation of the hearing.

As the Examiner's decision of January 12, 1966, is correct, it is hereby affirmed.

Messrs. Lester E. Martin and J. A. Tinsley, Jr., are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each claim included in the appeal. If the appeal covers all nine claims adversely affected by this decision, the total filing fee will be $45. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellants will have the burden of proving wherein the decision appealed from is in error.

If an appeal is filed, the adverse party to be served is:

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Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures (2)

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Div. of L&M PM (2)
Adm. Asst., Hearings
OPD
Gower Federal Service
Appeals List No. 1

appeal to Sec A-31052

Mining Claims: Discovery 3413

Where mining claimants have offered no evidence of the existence of any specific vein or lode of mineralized rock in place, exposed on any of the contested lode mining claims, which bears sufficient mineral values to justify a person of ordinary prudence in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the claims, lacking a discovery, are properly declared null and void.

With respect to nonmetallic deposits of widespread occurrence, such as building stone, it must be shown that the materials could be extracted, removed and marketed at a profit before the mineral materials may be considered a valuable mineral deposit; and, where the record shows that the mining claimants had not sold any building stone from their claims before September 2, 1943, the date on which the land was taken over by the Government in condemnation proceedings, and in the absence of evidence to show that they could have extracted, removed and marketed such materials from the claims before September 2, 1943, the claims are properly declared null and void for the lack of a discovery of a valuable mineral deposit.

Mining Claims: Mill Sites 3417

A mill site which has not been used for mining or milling purposes is properly declared null and void. Furthermore, the validity of a mill site is necessarily dependent upon the validity of lode claims to which it is appurtenant.

United States v. Ray L. Steven and E. E. McNeil, Contests LA 0170969-C-10 and C-11 (August 22, 1968)

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SACRAMENTO LAND OFFICE
1968 AUG 30 PM 2 24

In reply refer to:
704
LA 0170969-C-10 and
LA 0170969-C-11

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D. C. 20240

August 22, 1968
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DECISION

United States of America, :
Contestant :
v. :
Ray L. Steven, also known as :
Raymond L. Steven, and E. E. McNeil, :
Contestees :

Involving the Big Nine
mill site claim, and the
Big Nine and Big Nine Nos.
1, 2, 3, 4, 5, 6, 7, 8,
9 and 10 lode mining claims
located in Secs. 13 and 14,
T. 25 S., R. 44 E., M.D.M.,
California

Decision Affirmed

Ray L. Steven and E. E. McNeil have appealed from a Hearing Examiner's decision, dated December 27, 1965. The Examiner's decision declared the above-named lode mining claims null and void because each one of the claims lacks a discovery of a valuable mineral deposit; the Big Nine millsite claim was declared null and void because it has not been occupied or used for mining or milling purposes.

This combined proceeding was initiated by the issuance of two contest complaints by the Manager of the Riverside, California, land office of the Bureau of Land Management. Both complaints contained the following allegations with respect to the lode mining claims: (a) Minerals have not been found within the limits of the lode claims in sufficient quantities to constitute a valid discovery, and (b) The land embraced within the lode claims is non-mineral in character. With respect to the millsite claim, the complaint in LA 0170969-C-10 alleged as follows: (c) The millsite claim is not used or occupied for mining or milling purposes in connection with a vein or lode, and (d) The millsite claim has no quartz or reduction works thereon.

Civil Action No. 3129-PH, condemning a leasehold estate in the lands covered by the subject claims and Civil Action No. 769-60Y, condemning a leasehold estate in the claimant's possessory interest therein for use by the Department of the Navy in connection with its Mojave "B" Gunnery Range, were filed in the United States District Court for the Southern District of California, Central Division, at Los Angeles. Orders of Immediate Possession to the estates condemned were entered in the proceedings on September 2, 1943, and June 30, 1960, respectively. The lands, at all times since September 2, 1943, have been under possession of the Department of the Navy.

Hearings were held before the Hearing Examiner on March 6 and November 16, 1964, to afford the parties an opportunity of presenting evidence and of examining and cross-examining witnesses.

The record shows that the subject claims were located on various dates in the years 1937, 1938 and 1939.

Edward F. Cruskie, a mining engineer employed by the Bureau of Land Management, was duly qualified in his field and testified for the contestant. He stated that he examined the subject claims on December 21 and 22, 1961, and again on February 9, 1964. On two of these dates he was accompanied by Mr. Steven. The chief workings are on the Big Nine claim. The workings are all clustered together within a hundred feet in the area of the discovery monument and about 400 feet easterly. He took three channel cut samples in a cluster of cuts on the Big Nine within 75 feet of the location monument. The cuts are into the vein zone, and the vein zone is a stringer zone and a crumbly granodiorite with some iron stain. Two samples were taken from the Big Nine 7 claim, one from an iron-stain silicified zone and the other from an outcropping of quartz and calcite with iron stain. One sample was taken from the Big Nine 10 from an old cut containing a silicified zone. The three samples from the Big Nine assayed at $2.70, $1.69 and $2.15 per ton in gold and silver; the two samples from the Big Nine 7 are valued at $5.58 and $7.67 per ton in gold and silver; and the one sample from Big Nine 10 assayed $1.80 per ton in gold and silver. Five of the samples showed either a trace or no value in tungstic oxide, and some of the samples had inconsequential values in copper, lead and zinc.

Mr. Cruskie stated that there was no evidence of any foundations or structures or buildings on the Big Nine mill site claim, nor anything to indicate that there had ever been a milling process or other operation in connection with a millsite. There was an outcrop on the side line between the Big Nine and Big Nine 4 which Mr. Steven thought might be of some radioactive value. Mr. Cruskie took a sample there and tested it with a scintillometer and a geiger counter for radioactivity, but with negative results. Based upon his education, training and experience as a mining engineer, he expressed an opinion that a prudent man would not expend further time and effort and manpower to develop a paying mine on the claims.

On cross-examination of Mr. Cruskie, the contestees' attorney identified as Exhibit A an assay report of two samples taken by Mr. Steven, one of the contestees, showing values of $7.70 and $19.60 per ton in gold. Mr. Cruskie testified that $7.70 per ton would not represent a commercially workable mine under present standards. Asked if the $19.60 a ton sample is a commercial indication, he replied that it would depend upon whether it is a selective sample or a properly cut channel or chip sample, the width of the vein, and the continuity of the vein and the exposures of it. He stated that he picked out what was apparently the best looking material on the claims to sample and that "Mr. Steven could not put his finger on any particular place and say he had tested it before and it ran so much in gold and silver. He was rather vague about the whole works." The contestees' attorney had three rocks taken from the claims identified as Exhibits B, C, and D. He asked if it isn't

a fact that the type of rocks represented by these exhibits have and had a commercial value in themselves independently of any gold, silver and other minerals contained on the claims. Mr. Cruskie replied that when the work was done they had no marketable value and while they have a marketable value now they are, in his opinion, in the range of widespread material and nothing special in the way of minerals.

Mr. Ray L. Steven, one of the contestees, a building contractor and a practical miner with a correspondence course in mining engineering, testified in behalf of the contestees. He stated that before September 2, 1943, he had assays made of samples from each of the claims, except the Big Nine Nos. 2, 3, 8, 5, 6, and 7 claims, which claims were taken for flagstone and not for other minerals such as gold. He was unable to find his assay reports. The assays were made by Eisenhauer Laboratories, and when he requested Eisenhauer for copies of the reports they were not available as they had been destroyed in a fire in 1962. Testifying from memory to the best of his recollection, he stated that these assays--some 10 or 12--assayed from $16 to $74 a ton. He obtained the two samples for the assay report that had been theretofore identified as Exhibit A from the Big Nine claim. The values of these samples are $7.70 and $19.60 per ton in gold. He didn't get these samples from the hardrock itself but picked them up from a dump near the discovery site. He expressed his opinion that prior to September 2, 1943, a reasonable and prudent man would be willing to invest his time, money and effort into the mining of the Big Nine and Big Nine Nos. 1, 4, 9, and 10 claims, stating that a Joe Cruz of Seaboard Finance Corporation offered to put up $20,000 to finance these claims, but that in a little while the Government came in and took over the property and that finished the deal. He stated his opinion that before September 2, 1943, the flagstone on the Big Nine Nos. 2, 3, 8, 5, 6, and 7 claims had a commercial value, although no flagstone was ever sold from the claims. He said that Big Nine No. 7 does assay some gold, but that he believes it is better to use as flagstone. He never constructed a mill on the Big Nine mill site because the property was taken over by the Government.

On cross-examination, Mr. Steven stated that he showed Mr. Cruskie most of his discovery cuts on the various claims. As for the samples that he had taken before 1943 and had assayed by Eisenhauer Laboratories, which assay reports had been lost or destroyed, he was vague as to the method of taking the samples, the locations of the samples, size of the samples, and width of the veins. He stated that the two samples assayed in 1964 (Exh. A) were rocks that he had picked out of a cut on the Big Nine claim.

Mr. Edward E. McNeil, one of the contestees, who is in the decorating supply business, testified that he became interested in the subject claims because of the flagstone. He stated that before 1943 he could probably have sold the flagstone on the claims for $40 to $60 a ton, and that the mining and delivery costs would figure about $20 to $21 a ton. He said there was a market for such materials at that time.

On rebuttal, Mr. Cruskie stated, as to the veins, that the stringer zones on the Big Nine and Big Nine No. 1 would average about 5 feet; that the Big Nine No. 10 was sampled over one foot wide, and the outcropping was about 40 feet long; and that the Big Nine No. 4 showed silicified zones but he did not find any significant workings on the stringer zones and he took no sample. He stated that the assays that Mr. Steven had made before 1943 would be construed or defined as selective or grab samples. He also stated that there was no market for the type of rubble rock on these claims until about 1953.

At the close of the hearing on March 6, 1964, the Hearing Examiner agreed to hold the record open upon a stipulation by both parties that a joint sampling would be conducted on the Big Nine Nos. 1, 4, 9 and 10 claims.

The hearing was reopened on November 16, 1964. However, it developed in the course of the hearing that the parties had not conducted a joint sampling at places agreed upon, but each had conducted its own sampling independently of the other. Mr. Edward E. McNeil testified that he had taken two samples from the No. 4 claim. One sample had a combined gold, silver and copper value of $26.87 per ton (Exh. F). The other one had a combined gold and silver value of $15.06 per ton (Exh. H). One of the samples was chipped off a big rock, and the other consisted of a boulder that he broke off and some surface rocks that he picked up. He also had assayed three samples that Mr. Steven had taken and given him in bags to take to the assayer. One of these samples from the No. 5 claim assayed at $50.03 per ton in gold and silver; one from the No. 9 claim had a combined value in gold and silver of $77.50 per ton; and the other sample taken from the Big Nine No. 10 claim assayed at $43.01 per ton in gold and silver (Exh. G). Mr. Ray Steven confirmed the fact that he had taken the samples, the assays of which are shown on Exhibit G. He had chipped them from ledge matter on the claims.

Mr. Cruskie, who was recalled as a witness for the contestant, testified to the taking of six additional samples from the Big Nine Nos. 10, 9, 4, and 1 claims. These samples assayed in combined gold and silver values of $0.36, $0.62, $0.58, $0.72, $0.94, and $0.21 per ton (Exhs. 31-36).

At the close of the hearing on November 16, 1964, since a joint sampling had not been carried out as ordered and since both parties had submitted assays showing such wide differences in values, the Hearing Examiner again ordered a joint sampling of the Big Nine Nos. 1, 4, 9, and 10 claims, the samples to be taken at places picked by the contestees, and only to be taken from rock in place. Pursuant to the written request of the contestees' attorney, the Hearing Examiner on January 25, 1965, issued a written order amending the order made at the hearing to include the Big Nine claim in the joint sampling, in addition to the other four claims.

The joint sampling was accomplished on February 13, 1965, and a joint statement describing the sampling procedure, together with an assay certificate of the samples taken, was thereafter submitted to the Hearing Examiner. According to the joint statement, no vein or lode of quartz or other rock in place on the Big Nine No. 4 or No. 9 claims was designated for sampling.

On the Big Nine claim Mr. McNeil pointed out a crosscut tunnel which extends approximately 16 feet into the hillside. Near the end of the tunnel a 6-inch quartz veinlet in granite felsite cuts through and drifts on for approximately five feet each way. Three samples were cut from this veinlet. The area on the Big Nine Nos. 1 and 10 claims designated for sampling by Mr. McNeil is a cut on the sideline common to both claims. A lens or pod of quartz on the surface above the southeast corner of the cut was pried loose by Mr. McNeil and let drop to the bottom of the cut. This lens or pod represents approximately an 18-inch width of quartz. The material is a glassy iron-stained quartz veinlet in granite felsite. The glassy quartz had feathered out at a point seven feet below where the lens or pod was pried loose. Four samples were taken, as follows: One was a chip sample cut from the felled lens or pod of quartz; one was selected from the fragments of the chip sample; one from the base of the cut; and the last was taken across an 18-inch width of quartz in felsite at a point approximately 40 feet southeast from the cut. The assay report shows the following values for these samples:

Sample No.	Gold Value Per Ton	Silver Value Per Ton	Total Value Per Ton
Big Nine lode claim:			
B-9-1	$9.10	$1.81	$10.91
B-9-2	7.00	.41	7.41
B-9-3	9.10	.34	9.44
Big Nine Nos. 1 and 10 lode claims:			
B-9-1-B-9-10-100	9.80	.26	10.06
B-9-1-B-9-10-100-A	13.65	.62	14.27
B-9-1-B-9-10-101	2.80	.28	3.08
B-9-1-B-9-10-102	3.15	.29	3.44

The discovery of a valuable mineral deposit is a necessary requirement for a valid mining claim under the mining laws of the United States, 30 U.S.C. § 23 (1964).

The rule of discovery was announced by the Department in Castle v. Womble, 19 L.D. 455 (1894), and was quoted and approved by the Supreme Court of the United States in Chrisman v. Miller, 197 U.S. 313 (1905). It reads:

> Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

In Jefferson-Montana Copper Mines Co., 41 L.D. 320 (1912), the Department set forth the requirements necessary to establish a valid discovery on a lode mining claim, as follows:

> 1. There must be a vein or lode of quartz or other rock in place.
>
> 2. The quartz or other rock in place must carry gold or some other valuable mineral deposit.
>
> 3. The two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in an effort to develop a paying mine.
>
> It is clear that many factors may enter into the third element: The size of the vein as far as disclosed, the quality and quantity of mineral it carries, its proximity to working mines and location in an established mining district, the geologic conditions, the fact that similar veins in the particular locality have been explored with success and other like facts, would all be considered by a prudent man in determining whether the vein or lode he has discovered warrants a further expenditure or not.

The discovery required by the mining laws means more than a showing only of isolated bits of mineral not connected with or leading to substantial values. United States v. Josephine Lode Mining Development Company, A-27090 (May 11, 1955); United States v. Richard L. and Nellie V. Effenbeck, A-29113 (January 15, 1963); United States v. Cooper et al., A-30267 (May 11, 1965). Furthermore, in United States v. C. F. Pruess et al., A-28641 (August 22, 1961), the Department held (syllabus): "Reports of assays showing that occasional samples of material from lode mining claims contain high values for gold are not conclusive evidence of a valid discovery but other relevant factors are to be considered, such as the extent of the mineral deposits on the claims and the number of samples of material assayed from the claims showing only a trace or no mineral values in determining whether a discovery of valuable minerals has been made." (Emphasis added).

A prudent man may be justified in doing further exploratory work in the hope of finding a discovery. However, a valid discovery under the mining law requires more than a finding of mineral indications which would not warrant development work but only further exploratory work to determine if a valuable mineral deposit exists in a claim. United States v. George C. Johnson and Robert A. Johnson, A-30603 (October 25, 1966); United States v. O. Kenneth Smith, A-30626 (December 15, 1966).

With respect to nonmetallic deposits of widespread occurrence, such as building stone (flagstone, in the instant case), the Department has long adhered to the rule that it must be shown that the material can be extracted, removed and marketed at a profit before the mineral substance may be considered a valuable mineral deposit. Layman et al. v. Ellis, 52 L.D. 714, 721 (1929). See also

the recent decision in United States v. Coleman, 390 U.S. 599 (1968), in which the Supreme Court of the United States affirmed the Department's marketability test.

The area embracing the claims was withdrawn from further occupation and location under the general mining laws by the possession of the land by the Navy Department on September 2, 1943, the date of issuance of the order of immediate possession in condemnation by the court. United States v. Grace E. Hutchins et al., Los Angeles Contest 0170969-C-3 and C-4 (December 22, 1964), approved by the Under Secretary of the Interior on January 8, 1965. Thus, any discovery of valuable minerals must have been made before that date.

The burden of proof as to a discovery is first upon the Government to establish a prima facie case as to non-discovery, and the burden then shifts to the mining claimant to establish the validity of his claim by a preponderance of the evidence. Foster v. Seaton, 271 F. 2d 836 (D. C. Cir. 1959).

In carefully reviewing the evidence adduced at the hearing in the light of these governing principles of law, we find that the record clearly shows that there have been no discoveries of valuable minerals within the meaning of the mining laws on any of the claims in issue. The record is clear that the contestees have never sold any building stone (flagstone) from the claims. Further, they have not shown that the stone could have been extracted, removed and marketed at a profit prior to September 2, 1943, although they held the claims from approximately four to six years prior to that date.

Further, the Hearing Examiner correctly held that there has been no discovery of valuable metallic minerals on any of the claims when he stated:

> The contestant's evidence indicates generally the existence of inconsequential gold and silver values in rock exposed on the claims. Those contestant's samples bearing the highest values ranging from $9.00 to $14.00 per ton were taken from narrow veinlets, or lenses, so limited in extent that they would not warrant development. The contestant thus established, prima facie, that no valid discovery has been made on any of the claims.
>
> The contestee's assay reports show very high mineral values. However, an assay report is of little significance unless it is supported by evidence of the nature and extent of the exposed mass of rock in place from which the sample was taken. The contestees' testimony as to the location and extent of the veins which they sampled is extremely vague.

> contestees have offered no clear, probative evidence that the exposures of rock in place from which their higher samples were taken bear consistent values and occur in such width, depth or lateral extent as to warrant development.
>
> The second joint sampling was ordered to clarify the wide discrepancies in the assay values theretofore reported by each of the parties. The contestees were obviously aware of the fact that it was in their best interest to designate for sampling those exposed lodes which would reflect the highest mineral values. The report of the joint sampling does not confirm the high assay values previously reported by the contestees. The six-inch veinlet sampled on the Big Nine claim, showing assay values of approximately $10.00 per ton, is not a deposit worthy of development. The two samples of the lens or pod of quartz on the No. 1 and No. 10 claims are of little import since the lens or pod of quartz feathered out within the working. The samples are therefore not representative of any significant vein or lode on the claims. The remaining samples, having assay values of $3.44 per ton, or less, over an 18 to 24 inch width of vein material, do not indicate a vein worthy of development.
>
> It must be concluded that the contestees have offered no probative evidence of the existence of any specific exposed vein, or lode of mineralized rock in place, on any of the contested claims which bears sufficient mineral values to justify a person of ordinary prudence in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine.

The record is clear and uncontroverted that there has not been a mill or reduction works on the Big Nine mill site claim, nor has it been used for mining or milling purposes. The mining law permits the location of a mill site claim for nonmineral land to be used or occupied for mining or milling purposes, 30 U.S.C. § 42(a) (1964). A millsite not occupied or used for mining or milling purposes is invalid. United States v. John L. Cooper et al., supra.

The appellants argue that minerals have been found within the limits of the lode claims in sufficient quantities to constitute a valid discovery, partial proof of this statement being the result of the joint sampling ordered by the Hearing Examiner; that the Hearing Examiner gave virtually

no credence to the testimony of the contestee, Ray L. Steven; that it is the uncontradicted evidence of the contestees that there are millions of tons of beautiful and valuable building stone embraced within certain of the lode claims; and that the denying of the mill site claim is not justified because from 1941, due to this nation's participation in World War II, it was impossible to obtain fuel and materials because the mining of gold and silver was not an essential wartime activity.

None of these reasons has any merit. The answers to them are, more or less, contained in the discussions hereinabove. Although some of the samples taken in the joint sampling effort showed fairly good values, the Hearing Examiner correctly pointed out that the samples were not representative of any significant vein or lode on the claims because they were taken from a six-inch veinlet and from a lens or pod of quartz which feathered out within the working. This is certainly not indicative of sufficient valuable mineralization exposed within the claims to justify a prudent man in the further expenditure of labor and means, with a reasonable expectation of developing a valuable mine. The Examiner gave as much credence to Mr. Steven's testimony as was justified under the circumstances. Although Mr. Steven testified to having obtained some very high values in his sampling, some of his samples were taken from a dump, and since his testimony as to the location and extent of the veins which he sampled was extremely vague, no definite conclusion can be drawn from his testimony. Samples and assays without sufficient data of extent of the mineral material sampled can mean little or nothing of evidentiary value. United States v. Northern Pacific Railway Co., 1 F. 2d 53, 57. The contestees' uncontradicted testimony that there are millions of tons of beautiful and valuable building stone on some of the lode claims is meaningless standing alone without proof that the stone could have been extracted, removed and marketed at a profit. See United States v. Coleman, supra.

It is unfortunate if the appellants were prevented from erecting a mill on the mill site after 1941 because of wartime restrictions. However the mill site claim was located on February 1, 1939, two or more years before the war, and it is not the Government's fault that the contestees did not erect a mill or use the claim for mining or milling purposes prior to the war. It would appear that the failure to so use the claim was due to the lack of mineral discoveries on the lode claims to which the millsite is appurtenant, and the fact that the contestees never carried on any actual mining operations justifying a millsite, although the lode claims had been located from two to four years prior to 1941. The millsite had never been used for mining or milling purposes. Furthermore, the validity of a millsite is necessarily dependent upon the validity of the lode claim to which it is appurtenant. United States v. Frank Coston, A-30835 (February 23, 1968). Since all of the lode claims are invalid, the mill site must also fall.

The appellants accuse the Government's expert witness of being flagrantly biased. This accusation is unfounded in the record.

The Hearing Examiner's decision of December 27, 1965, being correct, is hereby affirmed.

Messrs. Ray L. Steven and E. E. McNeil are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each claim included in the appeal. If the appeal covers all twelve claims adversely affected by this decision the total filing fee will be $60. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

If an appeal is filed, the adverse party to be served is:

Regional Solicitor
U.S. Department of the Interior
7759 Federal Building
300 North Los Angeles Street
Los Angeles, California 90012

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures (2)

DISTRIBUTION:
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Mr. E. E. McNeil
Div. of L&M S&T (4)
Div. of L&M PM (2)
Adm. Asst., Hearings
OPD
Gower Federal Service
Appeals List No. 1

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

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Mining Claims: Discovery 3413

In order to satisfy the requirement for discovery on a mining claim located for a common variety of building stone prior to July 23, 1955, it must be shown that the material could have been extracted, removed and marketed at a profit before that date; and where the only use made of the stone on the mining claim prior to July 23, 1955, was in the construction of a single fireplace by one of the claimants, for which he received $400 for the completed job, and where the other evidence failed to show that the claimants could have extracted, removed and marketed the stone at a profit prior to July 23, 1955, the claim is properly declared null and void for the lack of a discovery of a valuable mineral deposit.

A prospective market, using that term in the sense of a market which may or may not be developed at some unforeseeable time in the future, is insufficient to establish a discovery on a mining claim located for building stone.

Mining Claims: Hearings 3482.2

Due process in an administrative proceeding to determine the validity of a mining claim implies notice and a hearing, and it is sufficient that the claimant be afforded the opportunity to defend himself. The procedure followed by the Department in the initiation, prosecution, and deciding of contests in mining cases is in compliance with the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1966).

United States v. Vaughn K. Taylor et al., Sacramento Contest No. 079069 (September 17, 1968)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 OCT 1 AM 10 00

In reply refer to:
704
Sacramento 079069

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D. C. 20240

September 17, 1968

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America, Contestant v. Vaughn K. Taylor, Burke C. Maynard, Fred A. Kochergen, Esther Kochergen, Contestees	:	Involving the White Ledge mining claim located in Sec. 11, T. 6 S., R. 21 E., M.D.M., recorded in Book 455,, page 216, Official Records of Madera County, California

Decision Affirmed

Burke C. Maynard, Fred A. Kochergen and Esther Kochergen have appealed from a Hearing Examiner's decision, dated March 17, 1966, which declared their White Ledge mining claim null and void because of the absence of any evidence showing that the material on the claim could be mined and marketed at a profit prior to the enactment of the act of July 23, 1955, 30 U.S.C. §§ 611-615 (1964).

This proceeding was initiated by a contest complaint issued at the request of the Forest Service, United States Department of Agriculture. The contestees filed a timely answer to the complaint denying the allegations therein, which are:

(1) The existence of a deposit of valuable mineral of sufficient quantity to constitute a valid discovery is not disclosed within the boundaries of the mining claim;

(2) The land embraced within the claim is nonmineral in character;

(3) Residential dwellings have been constructed on the claim and are being used for purposes other than active prospecting, mining or processing operations and uses reasonably incident thereto.

The White Ledge claim was located in 1948. The claim contains a deposit of white quartz, which the contestees claim is a valuable building stone. The Hearing Examiner held that the quartz is a common variety of stone under section 3 of the act of July 23, 1955, supra, which, in effect, withdrew lands from location under the mining laws of the United States for common varieties of stone, sand, gravel, etc.; that, as the claim was located prior to the act of July 23, 1955, supra, in order for it to be valid, a market for the material must have been established prior to that date; that the contestees are predicating their marketability of the material upon a hopeful future market; and that the claim is null and void because of the absence of any evidence showing that the material could have been mined and marketed at a profit prior to the withdrawal of July 23, 1955. He said that it is also

evident that the contestees have not established a present market for the quartz, and there is no showing that even if a market is established that there is a sufficient amount of material on the claim to sustain a commercially profitable venture.

The Hearing Examiner summarized the testimony of the witnesses and the documentary evidence produced at the hearing in considerable detail, and he then set forth his findings of fact from the evidence adduced. As his findings of fact are correct and pertinent to the issues involved, and as the appellants agree that his summary of testimony as set out in the decision correctly reflects the testimony of the various witnesses, we will merely set out the salient findings of fact for this decision.

The White Ledge placer mining claim was located by Sam and Anel Mobley on September 15, 1948. The location was based upon an alleged valuable discovery of zircon, titanium and/or other valuable minerals and building stone. By various conveyances, as set forth in the decision, title to the claim vested in the contestees. The Examiner found:

> The material on the claim consists of a single ledge of white quartz with outcroppings at an undetermined depth. There are no known intrinsically valuable minerals on the claim. The claim was acquired by the present possessory title holders for use of the white quartz for decorative purposes in construction of fireplaces, patios, barbecues, and decorative paneling for building fronts. The method of mining is by blasting or jack-hammering the outcrop, loading the rubble into trucks and transporting it to contestees' lot in Fresno, California, a distance of approximately 60 miles. The material is then used as needed for decorative purposes.
>
> The material is claimed to be unique because of its white luster. A fireplace constructed of large boulders of white quartz for which Mr. Maynard received $400 was the only use made of the white quartz from the claim prior to 1955 (Exh. D, Fresno Bee-August 1, 1965). There is evidence of other uses of the material after 1955. Contestees' testimony is to the effect that they have hunted and searched for a better use for the material, and that in the last couple of years they have developed a use for the rock by breaking it in fine pieces and imbedding it in resin to be used as table tops, and building front paneling * * * .

The appellants do not challenge the determination that the quartz is a common variety of rock. Nor do they seriously challenge the holding that they have failed to show that the stone could have been mined and marketed at a profit prior to July 23, 1955. They admit that they and their predecessors in interest

had not developed any extensive commercial use of the mineral prior to the passage of the act of July 23, 1955, supra, but contend that the evidence shows that there was actual commercial value and that the mineral had been used in the construction of a fireplace and as decorative rock and that they were in the process of experimenting to develop other commercial uses.

It was necessary for the claimants to prove the validity of their claim by a preponderance of the evidence. Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959). The one use made of the stone prior to July 23, 1955, was by Mr. Maynard for the construction of a fireplace. He was paid $400 for the job, but he could not assign any price that he had received for the stone. Thus there is an absence of evidence of the marketability of the stone prior to July 23, 1955. Furthermore, the evidence failed to show that the stone could be mined and marketed at a profit at the present time. Mr. Maynard stockpiled the stone in his construction yard and he used it a few times in his construction work whenever he had occasion to do so, such as for decorative landscaping of a lot in 1956 and for other decorative purposes. As the Hearing Examiner stated, the pecuniary value of the stone on the claim expressed in dollars and cents is minimum 1/, the aesthetic value of the finished product depends to a greater or lesser extent upon the skill of the workmen, and any monies derived from the sale of such articles may be attributed for the most part to their services and not to the value of the rock itself.

The experimentation that the claimants are carrying on to develop other commercial uses, such as by breaking the rock in fine pieces and imbedding it in resin to be used as table tops, etc., is no indication that the stone can be mined and marketed at a profit. This is only prospective marketability, which may or may not develop at some unforeseeable time in the future. A prospective market, using that term in the sense of a market to be developed in the future, is not sufficient to establish the validity of a claim under attack at the present time. United States v. Everett Foster et al., 65 I.D. 1, 8 (1958), affirmed in Foster v. Seaton, supra.

The appellant states that the sole question on appeal is whether the United States could legally make the act of July 23, 1955, amending the mining laws to remove common varieties of stone such as building stone from the category of valuable mineral deposits, retroactive and deprive mining claim holders who had located claims under the act as it previously existed of their property rights without due process of law. Since the enactment of the act of July 23, 1955, the Department has consistently held that the act withdrew common varieties of building stone, sand and gravel, etc. from location under the mining laws, and that it is incumbent on a mining claimant to show that all the requirements for discovery of a valuable mineral deposit, including a showing that the materials could have been extracted, removed, and marketed at a profit, had been met by that date. This was the Department's holding in United States v. Alfred Coleman, A-28557 (March 27, 1962), recently

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1/ One of contestant's witnesses testified that the Forest Service receives about 25 cents a ton for rock in place in the national forests.

affirmed by the United States Supreme Court in United States v. Coleman, 390 U.S. 599 (1968) 2/.

It is true, of course, that the claimants' property rights could not be nullified without due process of law, but this administrative proceeding is in conformity with due process of law. Due process in an administrative proceeding to determine the validity of a mining claim implies notice and a hearing, and it is sufficient that the claimant be afforded the opportunity to defend himself. The appellants have not pointed to any aspect of the prosecution of this case that differs from the usual prosecution of such cases, which has long been recognized by the courts. See United States v. Charles D. and Jeanne D. Haas, A-30654 (February 16, 1967), and the Departmental and Court decisions cited therein. Moreover, it is well established that the procedure followed by this Department in the initiation, prosecution, and deciding of contests in mining cases is in compliance with the Administrative Procedure Act, 60 Stat. 237 (1946), as amended, now 5 U.S.C. § 551 et seq. (1966), formerly 5 U.S.C. § 1001 et seq. (1964). In support of this conclusion, also see United States v. Charles D. and Jeanne D. Haas, supra, and the cases cited therein.

For the reasons given, the Hearing Examiner's decision is hereby affirmed.

Burke C. Maynard, Fred A. Kochergen and Esther Kochergen are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellants will have the burden of proving wherein the decision appealed from is in error.

If an appeal is filed, the adverse party to be served is:

Regional Attorney
Office of the General Counsel
U.S. Department of Agriculture
630 Sansome Street, Room 860
San Francisco, California 94111

Frances A. Patton

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

Dist. on page 5

2/ This case also involved deposits of quartzite building stone.

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Div. of L&M PM (2)
Gower Federal Service
OPD
Appeals List No. 1

Mining Claims: Common Varieties of Minerals 3511

Whether deposits of stone within a mining claim are common varieties of stone no longer locatable under the mining laws since the act of July 23, 1955, or are locatable as an uncommon variety having a "distinct and special value," may be determined by ascertaining whether the deposit has some property making it useful and, therefore, valuable for some purpose for which other commonly available materials cannot be used, or if used for the same purposes as minerals of common occurrence, by determining if it has some property which gives it a special value for such use as reflected by the fact that the material commands a significantly higher price in the market place than the other materials.

A decision of a Hearing Examiner holding a mineral to be of common variety will be set aside and the case will be remanded for a further hearing to develop further evidence where the record is too indefinite or inadequate to achieve a meaningful determination on the issues involved.

United States v. Richard M. Lease, Contest No. 06667 (Riverside) (October 10, 1968)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 OCT 21 AM 10 00

In reply refer to:
704
Contest No. 06667
(Riverside)
October 10, 1968

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

Certified Mail
Return Receipt Requested

DECISION

United States of America, Contestant v. Richard M. Lease, Contestee	:	Involving Sharpless Dolomite #1 placer mining claim situate in Section 7, T. 2 N., R. 1 E., S. B. M., San Bernardino County, California, within the San Bernardino National Forest

Decision Set Aside; Case Remanded

Mr. Richard M. Lease has appealed from a decision of a Hearing Examiner dated April 1, 1966, which declared the Sharpless Dolomite #1 placer mining claim null and void for lack of discovery of a valuable mineral deposit within the purview of the mining laws.

This proceeding was initiated on behalf of the United States at the request of the Regional Forester (San Francisco), Forest Service, U. S. Department of Agriculture, by the filing of a complaint alleging (1) that a discovery of a locatable material has not been made within the claim or any of its subdivisions, (2) that the land within the claim is nonmineral in character, and (3) that the land is not chiefly valuable for building stone. The contestee filed a timely answer denying the allegations, and a hearing was held November 4, 1965, at San Bernardino, California. At the hearing, the contestant was represented by the Office of the General Counsel, U. S. Department of Agriculture, and the contestee was represented by Fred H. Almy, Attorney at Law.

The record discloses that Sharpless Dolomite #1 placer mining claim was located July 2, 1957, on E½NW¼, E½SW¼NW¼, NE¼SW¼, E½NW¼SW¼ section 7, T. 2 N., R. 1 E., S.B.M., by eight locators, and through mesne conveyances, title to the claim vested in Richard M. Lease, the contestee. The claim is within the San Bernardino National Forest, approximately one mile north from Big Bear Lake. Dolomite is the mineral for which the claim was located.

The Hearing Examiner, after hearing testimony and receiving evidence, sustained the charge of no discovery set forth in the complaint, and declared the Sharpless Dolomite #1 placer mining claim null and void for lack of discovery of a valuable mineral deposit within the purview of the mining laws.

The appellant contends that the Hearing Examiner erred in his interpretation of the testimony and the evidence at the hearing. He states there is no doubt that the mineral material is a dolomite within textbook definitions of this mineral, as the actual analysis of the Sharpless Dolomite closely approximates the theoretical 21.9% MgO, 30.4% CaO, and 47.7% CO_2, and that the contestant had accepted this composition without question. He contends that the technical literature recognizes the lack of extensive beds of dolomite in western United States and asserts the Sharpless Dolomite #1 claim is a localized deposit of high purity dolomite. He agreed that the principal uses to which the extracted dolomite had been put included aggregate for concrete, leaching lime and ground cover, but asserted there is no comparable dolomite in the same area. He repeated the textbook uses for which dolomite is suitable but did not show that the Sharpless Dolomite was actually being used in quantity for fluxing, or any chemical or metallurgical purposes. He argues that his willingness to expend capital for a new and larger processing plant at the claim indicated the venture enjoys a reasonable prospect for success so that as the dolomite is an uncommon material, his discovery satisfies the prudent man rule in Castle v. Womble, 19 L.D. 455 (1894), and the present marketability rule affirmed in Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959).

We have reviewed the entire record with the contentions of the appellant in mind. The testimony at the hearing will be summarized briefly. It is adequately set forth in the Hearing Examiner's decision.

The hearing showed no factual controversy over the character of the mineral material present. The contestee's designation of dolomite for the mineral was accepted by the contestant, and no attack was made against the accuracy of the contestee's analyses which showed the dolomite on the subject claim to contain from 20 to 22% MgO, from 30 to 32% CaO, and from 46 to 47% CO_2.

Emmit Ball, a mining engineer employed by the Forest Service, testified that there was a large deposit of high grade dolomite on the Sharpless Dolomite #1 claim, easily mineable because of having been fractured by seismic action; the dolomite possesses a fine grain and distinctive crystalline structure, different from other carbonate rocks in the vicinity. Mr. Ball recited many uses to which dolomite may be put in chemical and metallurgical fields, as well as more common uses such as aggregate, leach lines and decorative ground cover. He stated that when he visited the claim in September 1964, Big Bear Rock and Materials Company was marketing the dolomite for aggregate, leach lines and fill, all of which are uses to which sand, gravel, and many other rocks may be put. He stated that carbonate rocks were widespread within a 20 to 25 square mile area around the Sharpless Dolomite #1 claim, but he did not present any analyses to show that any of them was a dolomite.

Robert E. Read testified that during the period when he worked on the Sharpless Dolomite #1 claim as an employee of Big Bear Rock and Materials Company, the lessee of the claim, the largest portion of removed material was used as concrete aggregate, with some of the rock going for ground cover and some for leach lines. The dolomite was blended with other mineral material to create the aggregate mix. The rock was sold for about $5 per ton.

Richard M. Lease, the contestee, asserted the dolomite was an uncommon variety possessed of special and distinct properties making it valuable for commercial use in manufacturing, metallurgy or industrial operations, as well as for aggregate and other rock uses. He stated that the claim was leased to Big Bear Rock and Materials Company, which paid him a royalty of fifty cents per ton on an annual production of about 2000 tons since 1960. The processing plant at the claim had been increased to 300 tons daily capacity just prior to the hearing, so future production was expected to increase. He agreed that use of the rock in the past was as testified by Mr. Ball, for aggregate, fill, ground cover and leach lines, but stated he had obtained a sales agent in Los Angeles and hoped to market dolomite for metallurgical uses by industry in that area. He stated his price would be $7.50 per ton delivered, including a $1 commission to the sales agent. He stated his dolomite was closer to Los Angeles than comparable rock from the Cajon Pass area, of which some 800 to 1,000 tons were sold monthly in the Los Angeles area through the sales agent whom he had retained. He also stated that he had prospects of selling dolomite to a glass company in Pomona, but no actual sales had occurred prior to the hearing.

Thus, it is evident that while there are deposits of metallurgical dolomite on the Sharpless Dolomite #1 placer mining claim, the rock extracted up to the time of the hearing had been utilized almost exclusively for the same purposes of aggregate, ground cover, and leach lines for which other widely dispersed and easily available sands and gravels were similarly used.

The Hearing Examiner, consistent with previous rulings of the Department concerning deposits of common stone, denied the contentions of the contestee that the dolomite present on this claim was possessed of special and distinct values where it was being used only for concrete aggregate, leach lines and other purposes similar to readily available deposits of stone, and ruled that the dolomite on the Sharpless Dolomite #1 placer mining claim was of a common variety under the Act of July 23, 1955, 30 U.S.C. § 611 (1964), 1/ adverting to United States v. Kenneth McClarty, 71 I.D. 331 (1964), and other cases.

1/ Section 3 of the Act of July 23, 1955, supra, provides: A deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws; Provided, however, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common varieties" as used in this Act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more." An amendment by the Act of September 28, 1962, 76 Stat. 652, 30 U.S.C. § 611 (1964), also added petrified wood to the materials listed in this section.

Recently, on July 31, 1968, the contestee requested the hearing be reopened and submitted an affidavit of one Douglass Hayes in which it is stated that he is the lessee of the Sharpless Dolomite #1 claim and that from September 1967 to June 1968 he had shipped into the Los Angeles area 888.05 tons of metallurgical grade dolomite for use in the foundry trade. The contestant opposed the request to reopen the case.

Recent decisions of the Department, especially United States v. Gene DeZan, et al, A-30515 (July 1, 1968), compel a close examination of the Hearing Examiner's decision relating to dolomite and the request to reopen the hearing because of recent and increasing sales of the dolomite for metallurgical purposes.

In DeZan, supra, the Department set forth guidelines for determining whether a deposit of building stone or other substances listed in Section 3 of the Act of July 23, 1955, supra, is a common variety not subject to location under the mining laws since that date or is locatable as an uncommon variety having "distinct and special value." The determination may be made by ascertaining whether the deposit has some property making it useful for some purpose for which other commonly available materials cannot be used which gives it such value, or if the deposit is used for the same purposes as minerals of common occurrence by determining if it has some property which gives it special value for such use as reflected by the fact that the material commands a significantly higher price in the market place than the other material. See also United States v. U.S. Minerals Development Corporation, 75 I.D. 127 (1968).

In DeZan, supra, several placer mining claims in southern California were involved. Some of the claims had deposits of limestone, dolomite and wollastonite. It was acknowledged that the locatability of metallurgical or chemical grade limestone is excepted from the category of "common varieties," 43 CFR 3511.1(b), but it was also pointed out that limestone used only as rubble or aggregate in building construction is a common variety not subject to mining location. United States v. E.M. Johnson et al, A-30191 (April 2, 1965). Testimony as to chemical grade of limestone was not refuted by the Government. Conflicting testimony was given as to marketability of and demand for the limestone as chemical or metallurgical grade, and as to costs of mining, processing and transportation to show that marketing at a profit was possible. The Department then stated "/i/t is not sufficient, however, merely to establish the fact that the mineral deposits in question are uncommon varieties. Limestone, dolomite and wollastonite are minerals of widespread occurrence the marketability of which must be shown in order to establish the discovery of a valuable mineral deposit. Moreover, it is not enough to show that a market exists for a particular mineral and that a particular deposit of that mineral is of such quality as to satisfy the standards of that market. It must be shown, in addition, that the particular deposit itself can be mined and marketed at a profit." After review of the evidence the Department held that absence of more specific factual data precluded a satisfactory conclusion with respect to marketability of the

subject mineral deposits and remanded the case for further hearing on the question of discovery of a valuable mineral deposit of limestone, dolomite and wollastonite.

So in this case, our careful review of the record discloses the evidence therein to be inconclusive as to marketability of the dolomite on the Sharpless Dolomite #1 placer mining claim, the metallurgical grade of which was conceded by the Government, and so inconclusive as to the charge that discovery of locatable materials has not been made within the claim. The Government's lead witness agreed the dolomite is of high grade and different from other limestone-type rocks and could be used for fluxing, for refractory repair work, and for chemical and metallurgical purposes, but stated the only actual uses of the dolomite were those for which other common variety mineral materials were available. The contestee did not deny that the only sales of mineral material were for common variety uses but he did indicate efforts were being made to put the dolomite into the chemical and metallurgical market, for which it was eminently well suited. The subsequent affidavit that an increasing amount of dolomite is being disposed of for metallurgical use coupled with the hearing testimony as to the chemical character of the dolomite does not permit a satisfactory conclusion that the subject mineral deposit is of a common variety.

Accordingly, we find that the case should be remanded for further hearing on the question of discovery of a valuable deposit of dolomite.

The decision of the Hearing Examiner is set aside and the case is remanded for a further hearing to develop further evidence in accordance with the views set forth in this decision.

Frances A. Patton

Acting Chief, Office of Appeals
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OPD
Gower Federal Service
Appeals List No. 1

Mining Claims: Discovery 3413

In a contest proceeding involving mining claims containing deposits of diatomaceous earth, micaceous materials, bentonite, gallium, feldspar, and sand, it must be shown that the materials can be extracted, removed and marketed at a profit in order to constitute a mineral discovery; and where the mining claimant fails to show, by a preponderance of the evidence, that there is a demand for any of the materials on the claims or that the materials can be mined and marketed at a profit, the claims, lacking a discovery, are properly declared null and void.

United States v. Andrada Desert Enterprises, Inc., Riverside Contest No. 02425 (October 17, 1968)

DEPT OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 OCT 28 AM 10 00

In reply refer to:
704
Riverside Contest
No. 02425

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

October 17, 1968
CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

United States of America, Contestant	:	Involving the Le Plateau White Christmas and White Christmas No. 2 placer mining claims, located in Sec. 11, T. 17 S., R. 9 E., S.B.M., Imperial County, California.
v.	:	
Andrada Desert Enterprises, Inc., Contestee	:	

Decision Affirmed

Andrada Desert Enterprises, Inc., has appealed from a Hearing Examiner's decision, dated November 9, 1966, which rejected its mineral patent application Riverside 02425 and declared the above-named placer mining claims null and void because each claim lacks a discovery of a valuable mineral deposit. [1]

The contestee filed a mineral patent application for the claims on November 27, 1962, based upon the alleged discovery of diatomite. The Manager of the Riverside District and Land Office subsequently issued a contest complaint alleging as follows:

> (a) The materials found within the limits of the claims are not valuable mineral deposits under section 3 of the Act of July 23, 1955 (69 Stat. 367; 30 U.S.C. 601).
>
> (b) Valuable minerals have not been found within the limits of the claims so as to constitute a valid discovery within the meaning of the mining laws.

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[1] The appellant's statement of reasons for appeal was not timely served on the adverse party named in the Hearing Examiner's decision, although the statement of reasons has since been served on the adverse party. As the result of a statement submitted by the appellant's attorney showing that the failure of timely service was due to reasons beyond his control, the failure is excused. See United States v. Theodore R. Jenkins, A-30661 (December 13, 1966) and the cases cited therein. The appeal has, therefore, been considered on its merits.

The contestee filed a timely answer denying these allegations and alleging affirmatively that the materials exposed on the claims do not fall within the definition of "common varieties" as used in the said Act; that the deposits within the claims have distinct and special properties making the mineral valuable for use in a manufacturing, industrial or processing operation; and that the minerals found are valuable minerals and the discovery in each claim is a valid discovery within the meaning of the mining laws.

A hearing was held before the Hearing Examiner at El Centro, California, on April 19, 20, and 22, 1966. At the outset of the hearing the contestee's attorney made a motion that the mineral patent application be amended to include diatomaceous material, aluminum and gallium, which minerals were alleged to have been discovered since the patent application was filed. The motion was granted by the Hearing Examiner.

Tom H. W. Loomis, a mining engineer employed by the Bureau of Land Management, testified for the contestant that he examined the claims on various dates in 1964, 1965 and 1966, accompanied by representatives of the contestee. The claims are located on the Uah Desert in Davies Valley, 25 miles west of El Centro, California. The country rock is jurassic granodiorite with some volcanics, probably of Tertiary age. Tertiary sediments include silts, sand and volcanic debris with some lenses of diatomaceous materials. The area has a history of sporadic prospecting for mica, feldspars, gold and gem stones, but any recorded production in the general area is generally insignificant. There was no evidence of production although at the time of the hearing the company was in the process of installing some equipment. Two shipments of diatomaceous material were made from one outcropping back in the 1930's.

Mr. Loomis stated that in the west end of the White Christmas No. 2 claim there was a prominent outcrop of diatomaceous earth, capping a ridge of partially decomposed granodiorite. Surrounding the outcrop were numerous pits and auger holes. There were small, thin, near vertical stringers of bentonite material and calcareous clay material. The pits were generally in sand and some decomposed granodiorite. The auger holes were in granodiorite. Sample TL-25-1 was taken of clay material from a trench on the western edge of the claim. A test report on this sample (Exh. 6) showed that it did not have good gel properties necessary for commercial rotary mud, and that the sand content is far too high for use as rotary mud. Sample TL-18 was diatomaceous material taken from the southern point of the diatomaceous earth outcrop. It was a channel sample seven feet in vertical length across the diatomaceous earth layer. The assay report indicated that this sample contained 75.61% silica and 15.95% aluminum oxide (Exh. 4).

At the southeastern corner of the White Christmas claim there is an outcrop of diatomaceous earth surrounded by pits, scrapings, trenches and auger holes, which exposed decomposed granodiorite. At the time of his last visit the company was installing processing equipment in the southeast part of the White Christmas, including a belt conveyor, a trommel and a 3-compartment riffle.

He took a sample from a pile of decomposed granodiorite material in the southeast part of the claim. The sample contained 30 to 35 percent micaceous material, mostly biotite; 55 to 60 percent quartz; and some feldspar and hornblende. He obtained sample TL-20, a 6-foot vertical channel sample taken over what appeared to be the better part of the diatomaceous earth material, from the outcrop just off of the White Christmas claim, the assay report of which sample (Exh. 4) showed that it contained 83.62% silica and 8.98% aluminum oxide. A grab sample from the same site was submitted for evaluation as a filter aid. The evaluation report (Exh. 5) stated that the ore quality is not suitable for filter aids, although it may be acceptable for some of the absorbent types of diatomite products or for other uses. A sample, taken from a 1½-foot deep pit, was screened and examined under a binocular microscope to determine the mica content and other constituents of the rock. It appeared to contain 20 to 25 percent biotite and assorted other micaceous materials, approximately 50 to 60 percent quartz, a small amount of feldspars, and a small amount of hornblende. A sample of alluvium material from a trench near the east edge of the White Christmas claim contained 30 percent biotite and micaceous material, 50 percent quartz, and the remaining was hornblende and feldspar.

In the center of the Le Plateau claim, there is a large, scraped area with a sand pile containing several thousand yards. West of this there is a small, scraped pit down in the decomposed granodiorite material, intersecting a lens of diatomaceous earth, and apparently bottoming on the top of a layer of diatomaceous earth of unknown character. Four pits on the east part of the claim show ten feet or more of sand. At the southwestern corner of the scraped area, there is a small adit into the granodiorite approximately 50 feet in length.

Mr. Loomis expressed opinions that the materials on the claims have no special characteristics which would set them apart from common, ordinary, similar materials; that valuable minerals have not been found within the meaning of the mining laws because the diatomaceous earth occurs in fairly thin lenticular deposits, a few feet thick, and assays of these show they will not meet the standards for filter aid material, although they probably would do as common rock fillers, as insecticide carriers, and low-grade chemical uses where a silica is desired. The decomposed granodiorite carries 15 to 25 percent diatomaceous material, the majority of which is biotite, and the cost of processing the material would far exceed the value that could be obtained from the material. The clay or bentonite clay occurs in thin, vertical seams; it is not of suitable quality for drilling mud and, even if it were, it could not be properly mined because of thinness and erratic nature of the seams. The mining costs on any of these materials would exceed the price that could be obtained for them. He stated that there was no evidence of any production of minerals from the claims, other than it was reported to him that two carloads of diatomaceous earth were removed from the property in the 1930's and sold to oil companies.

On cross-examination, he stated that he identified the mica material as predominantly biotite with some chlorites, probably some sericite and some muscovite, and that they are real thin flakes and some of the micas are hard to determine. On cursory, visual examination the sand on the property appeared to be ordinary, desert sand commonly found through desert washes. He stated that granodiorite

is somewhat siliceous country rock composed of feldspar, biotite and micas, traces of hornblende and quartz, and that there is no difference between granodiorite and quartz diorite. The only bentonite he examined proved to be in small seams. There is exposed a few thousand tons of diatomite which is not suitable for use as a filter aid, although it may have a lower value use if a local market could be found for it.

Mr. Raymond Miller, a building, excavating, grading and paving contractor and president of the contestee corporation, testified that he observed three distinct exposures of diatomaceous earth on the property. The southern and northern exposures are approximately 200 feet long, 12 feet high and some 50 feet thick. There is another exposure in a canyon. He found various types of micaceous material, predominantly vermiculite, and a rare mica, paragonite, which he thinks is quite useful in industry. He also found biotite and sericite.

A qualitative spectrographic examination of a composite sample of the piled material on the Le Plateau claim showed the material to contain 16% mica (Exh. H-1), and of a sample of bentonitic material showed 30% mica (Exh. H-2). Bentonite has been exposed in an area 150 feet by 300 feet, and in some places it has a width of as much as 24 inches. The report of a qualitative spectrographic examination of a sample of diatomaceous earth revealed that the major constituent is silicon of 10% or greater (Exh. M). The greatest use of diatomaceous earth is for filters, and it is also used as an abrasive. Mr. Miller stated that they have developed a cleaner-polisher and rust inhibitor using diatomaceous earth, bentonite, sodium silicate and sodium aluminate, all of which is found on the subject claims. A patent for this product has been applied for from the Government, and some 50 bottles of it have been sold to test the market. They have several spectrographic examinations showing .05% gallium. Their physical consultant thought that they should try to determine the method of extracting the gallium because it is being used today in outer space and has many other uses. The gallium could be extracted and enriched, and there is a ready market for it.

Mr. Miller further testified that the clay will increase in volume 20 times, and from 5,000 cubic yards they would be able to make 100,000 cubic yards of gel. He said, "Now, 20,000 cubic yards of diatomaceous earth makes 60,000 cubic yards of products. If these are sold at a reasonable price of $2 per gallon, there would be over $24 million of products of diatomaceous earth and swelling clay in existence on the property at this time." They were negotiating with another firm that desired to put the mica to use. When this deal fell through, "then we really looked into the mica ourselves and determined that would be the proper direction for the corporation to go; to begin with, because we have such an abundant supply of these very fine micaceous materials and a ready market for it, we decided to extract the micaceous material and sell it by the ton. From the extract of the micaceous material, we should have quartz and sand, which would be a by-product, and we will have feldspars that would be by-products." He stated that there is a demand for micaceous material, "They desire it. We have no purchase orders, but we have the information that, depending on the quality and grade of the mica that we produce, they will determine the price; that they can use several thousand tons of the micaceous material from that property if we can produce it in accordance with their specifications."

Mr. Miller said that the corporation is in the process of constructing a plant on the property for separating the micaceous material from the quartz and feldspars, estimated to cost from $35,000 to $50,000, with which they expect to process 100 tons of material per hour. The sand on the property would not pass any test for concrete use as it is excessive in micaceous material, but it does have a market for abrasive qualities, sandblasting and other uses. Some of the sand is so fine that it will be used for polishing metals. There is a ready market for sand of this quality or type. The silica sand would have a value of $22 per ton. There is a ready market for feldspar found on the claims. It meets the specifications for the ceramic industry. They would not submit the bentonite material for drilling mud as it is too pure a bentonite for that purpose. Bentonite can also be used in ice cream products, as it suspends the ice cream for two hours before it will melt down, but the reason that they are not pressing the market is that they are trying to get the bentonite passed with the Food and Drug Administration for use in foods. He estimated that there are 76,000 cubic yards of diatomaceous earth on the property. His opinion was that the materials on the claims are unusual, different materials other than common sand and gravel. A report of qualitative spectrographic examination of a sample of diatomite showed the sample to contain .05% gallium (Exh. P). A similar report on a sample of incrustment that forms on the clay mounds indicates that the major constituent is sodium and the intermediate constituent is aluminum (Exh. Q). His opinion was that a prudent, reasonable man would be justified in expending money and labor in developing a practical and lucrative mining operation on the property.

On cross-examination, Mr. Miller stated that he had made no estimate of the quantity of paragonite on the claims. He has not sold any biotite from the property. It would have to be sold in large quantities. "Certainly, we are not going to wash biotite out by the ton." It is a mass-production material. Sericite is produced from a clay material. He has made no sales of bentonitic materials, except that used in the cleaner-polisher that was manufactured. They do not propose to make any sales of the raw material. They have made no sales of diatomaceous earth.

Mr. Morton Southard testified that the first time he saw the subject property was in 1933 or 1934. He visited the claims in 1963 or 1964 as Mr. Miller wanted his opinion on what could be done with the mica and diatomaceous earth on the property. He took samples to chemists in Los Angeles. Two of them advised him of a definite market for a light-weight, cheap, clean filling material. The mica materials that he took in were approved. He visited engineering concerns with reference to developing a mechanical screening device. He made some bulldozer cuts on the White Christmas and Le Plateau claims. There were observed some streaks of micaceous material ranging from a few inches to 10 feet in width. He bulldozed the material up into a 2,500 cubic yard stockpile. Some good diatomaceous and bentonitic material was exposed. There is a good market for bentonite mixed with water, and it can be sold for $65 to $80 a ton with a 50% discount for water fraction. Lubricating mica can be sold for $37 a ton. Diatomite used in the oil refining business brings between $57 and $67 a ton sacked. When asked how many tons of material he would run through his mill a day, he replied "To begin with, I think if I

run 60 to 70 tons a day to get the bugs worked out, and to get everything in proper operating condition, get my flows adjusted, why, I will be doing--we will increase it as I get the thing flowing properly."

Mr. H. Wayne Hoylman, a duly qualified consulting geophysicist, testified for the contestee that he made a preliminary ground magnetometer survey, and that he has been on the property and done some preliminary geophysical work which is only in the first stages. He did not consider any particular claim, preferring to look first at the regional geology surrounding the area. He made magnetic measurements, and he has defined a fault system and will eventually designate the drilling of core holes to determine the existence of certain minerals that may occur along this fault system. He observed diatomite, bentonite and micaceous materials on the property, including biotite and sericite. He estimated 8,000 to 10,000 cubic yards of diatomite, from 15,000 to 18,000 cubic yards of bentonite, and from 10,000 to 15,000 cubic yards of sericite exposed on the claims. However, he stated that these were very preliminary estimates because of the very limited amount of work that he has done. He has no way of projecting the reserves until additional core drill work and field work is done on the property. He has observed pure forms of bentonite and diatomite, which could find markets and make it profitable to carry on mining operations on the property. In his opinion there are materials on the property which are valuable because they have some property giving them a distinct and special value.

Tom H. W. Loomis, called as a rebuttal witness for the contestant, testified that gallium is recovered in trace amounts as a by-product from bauxite and zinc sphalerite mining operations, and that the principal gallium problem is the lack of demand, as only a small fraction of the potential output from bauxites and sphalerite sources has been achieved. During the past two or three years, he had made numerous inquiries in Los Angeles and Southern California areas as to a possible market for flake biotite mica and ground biotite mica, and the only encouraging market that he was able to ascertain is a hypothetical or potential possible market in the roofing industry. The materials are used as a filler and as a backing for asphalt roofing sheets. The industry is using a very low-cost backing, generally sand, which has served the purpose well and can be obtained delivered in Los Angeles for $3 or $4 a ton. Occasionally some mica is used as a backing. Other mica, muscovite scrap, which markets in Los Angeles for $30 to $35 a ton, is used on the outside surface where it shows. The industry will not pay as much for biotite mica flake as it will for muscovite flake or ground sericite. Diatomaceous earth is produced in quantity at Lompoc, 125 miles generally westerly from Los Angeles. There are at least two large companies engaged in the production, and they are highly competitive. The material is produced and refined. The principal use is as a filter aid, and the average price of filter aid material is $50 to $60 per ton, depending upon the buyer's specifications. During the mining and processing of this material, there is considerable waste which is not suitable for filter material, but is suitable for use in other purposes where the requirements are not as strict.

On cross-examination, he stated that he investigated users of mica such as the rubber and tire companies, paint companies and the various producers in the area that would and were handling the various types of micas, and that he made what he considered an exhaustive market survey. Ground micas are used in the United States for roofing, wallpaper, rubber, paint, welding rods, joint cement, well drilling and for molded electric insulation. Ground mica, as used by the trade, means a fine ground, white mica, generally muscovite, but occasionally high-quality grades of sericite can be substituted, usually at a lower price.

The Hearing Examiner said that a valid discovery is one which would warrant a man of ordinary prudence in the further expenditure of his time and money with a reasonable prospect of success in an effort to develop a paying mine, citing Castle v. Womble, 19 L.D. 455 (1894); Chrisman v. Miller, 197 U.S. 313 (1905); Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963); and that, in order to satisfy the requirement of discovery on a mining claim located for a deposit of a mineral substance of widespread occurrence, it must be shown that the deposit can be extracted, removed and marketed at a profit; and that this includes a favorable showing as to the accessibility of the deposit, bona fides in development, proximity to market and the existence of a present demand, citing Layman v. Ellis, 54 I.D. 294, 296 (1933); Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959); United States v. United States Silica Corporation et al., A-30400 (August 24, 1965). He also said, in substance, that Section 3 of the Act of July 23, 1955 (69 Stat. 367; 30 U.S.C. 601 et seq. (1964)) removed common varieties of mineral deposits from the operation of the mining laws, and that, where claims were located for deposits of common varieties of minerals of widespread occurrence, such deposits, in order to constitute valuable mineral deposits, must be shown to have been marketable at a profit on or before the date of the passage of the Act of July 23, 1955, supra, citing certain cases in support of this principle.

The Examiner then held that the materials exposed on the claims are common varieties, and not subject to location after July 23, 1955, because they are of widespread occurrence in Southern California, and there is no probative evidence to show that they possess any distinct special economic value for uses over and above the normal uses of other similar deposits of widespread occurrence. He then held that the materials exposed on the White Christmas, the only claim located prior to July 23, 1955, have not been shown to have been marketable on that date. Although we are inclined to agree with the Examiner's holding that the materials on the claims are common varieties of materials, we do not find it necessary to decide this question as the case can be disposed of on the basis of the lack of present marketability of the materials. We concur with the following holding of the Examiner:

> Assuming, ARGUENDO, that the subject minerals are subject to location under the mining laws, the contestee has not demonstrated the present marketability thereof. While the diatomaceous earth may be suitable for uses requiring diatomaceous earth of lower specifications than that used in filter aids, and while there may be a general market for such material, it has not been demonstrated that these particular deposits may be so marketed. Nor has

> it been demonstrated that the subject sand, bentonite, or various types of mica exposed on these claims may be sold in the general market for those materials. The testimony that the bentonite combined with water can be sold for $2.00 per gallon, unsupported by specific evidence of the market therefor, or the actual ultimate use of the bentonite gel, is insufficient to establish that the bentonite is, in fact, marketable. The contestee proposes to market special products developed in its laboratory utilizing the subject materials. However, only a limited amount of one product, a cleaner-polisher, has been sold. The relatively insignificant amount sold is not sufficient to establish the marketability of the material used in the cleaner-polisher. (See United States v. Frank Melluzzo et al., 70 I.D. 184 (1963). The contestee has failed to establish, by a preponderance of the evidence, that there is any present demand for these particular deposits, or that the same can be extracted, removed, and marketed at a profit.

The Government presented a prima facie case as to the lack of marketability of the materials through the testimony of its expert witness to the effect that the cost of processing the diatomaceous earth would far exceed the value that could be obtained from the material; that the bentonite clay could not be properly mined because of thinness and the erratic nature of the seams; that the principal gallium problem is the lack of demand, and only a small fraction of the potential output has been achieved; and that the mining costs on any of these materials would exceed the price that could be obtained for them. The contestee failed to overcome the prima facie case by showing by a preponderance of the evidence that any of the materials can be extracted, removed and marketed at a profit. See Foster v. Seaton, supra.

The contestee's case is completely devoid of any evidence as to the costs of mining, processing and transporting the various materials to market. Furthermore, the testimony of its various witnesses as to markets for the materials lacks any degree of specificity. Witnesses testified as to prices that might be obtained for some of the various materials, but there was no probative evidence presented to the effect that there is a present demand for any of the materials on these specific claims. Mr. Miller, testifying as to the demand for micaceous material, stated "They desire it. We have no purchase orders, but we have the information that, depending on the quality and grade of the mica that we produce, they will determine the price; that they can use several thousand tons of the micaceous material from that property if we can produce it in accordance with their specifications." This is all very "iffy" and does not prove a thing. It appears that the contestee's entire case is based on speculation, conjecture and hope. Thus, it has failed to prove that any of the materials on the claims can be mined and marketed at a profit.

On appeal, the appellant contends that the evidence is insufficient to justify the decision of the Examiner, and that the decision is against the law. We

have carefully reviewed and analyzed the basic reasons given for these contentions and find that they are without merit. We see no need for any lengthy discussion at this point inasmuch as many of the reasons have been covered in the discussion hereinabove. Many of the numerous reasons pertain to the Hearing Examiner's determination that the mineral materials on the claims are common varieties--a finding which we have not made in this decision.

The appellant also contends that the decision misapplies and violates the Congressional intent and purpose of the Act of July 23, 1955, supra, and that fatal procedural acts by the Examiner are sufficient to reverse the decision. These contentions, and the underlying reasons given therefor also pertain to the question of common varieties. There is no need to discuss them herein, because, as stated above, our decision is not based upon a determination as to whether the mineral materials found on the claims are of common or of uncommon varieties.

Another contention advanced by the appellant is difficult to understand. That is, that the Examiner's decision was based solely on bentonite and that he failed to take into consideration other minerals for which a motion was made at the hearing to be included in the patent application by amendment, in addition to the bentonite, which motion was granted by the Examiner. From our review of the evidence and the Examiner's decision, he considered all minerals for which any probative evidence was offered.

Accordingly, the decision below is correct, and it is hereby affirmed.

Andrada Desert Enterprises, Inc., is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each claim included in the appeal. If the appeal covers all three claims adversely affected by this decision, the total filing fee will be $15. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving wherein the decision appealed from is in error.

If an appeal is filed, the adverse party to be served is:

Regional Solicitor
U. S. Department of the Interior
7759 Federal Building
300 North Los Angeles Street
Los Angeles, California 90012

Frances A. Patton

Chief, Branch of Mineral Appeals
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Enclosures (2)
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In reply refer to:

Sacramento Contest No. 060347
C-1, C-4 to C-7 inc. (P. L. 167)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

October 18, 1968

DECISION

United States of America,
v.
N. M. Srdanovich,
Mining Claimant-
Appellant

Jimmie Boy No. 1, Charley Boy Nos. 1, 2, 3, and 4 lode mining claims located in secs. 29 and 32, T. 22 N., R. 8 E., M.D.M., California, within the Plumas National Forest.

Appeal Dismissed

Mr. N. M. Srdanovich appealed from the Hearing Examiner's decision dated June 18, 1968, which held that, prior to issuance of a patent, the above-identified mining claims are subject to the limitations and restrictions of section 4 of the Surface Resources Act, as amended, 30 U.S.C. § 612 (1964), for the reason that a valid discovery has not been shown within the limits of any of the claims.

The appellant has filed a motion requesting that his appeal to the Director be dismissed. Accordingly, the appeal is dismissed, the Hearing Examiner's decision is final, and the case is closed.

In reply to the appellant's assertion that he plans to continue prospecting on the claims, it should be noted that the Hearing Examiner's decision does not preclude the mining claimant from attempting to develop the claims under the mining laws, but merely determines that such activity is subject to the restrictions and limitations specified in section 4 of the Surface Resources Act, supra, which include the right of the United States, prior to patent, to manage and dispose of the vegetative resources on lands embraced in such claims and to manage other surface resources thereof. The lands are in a national forest; consequently, the management of the lands is within the jurisdiction of the Forest Service, United States Department of Agriculture. It is suggested that the mining claimant contact the Regional Forester (California Region), Forest Service, 630 Sansome Street, San Francisco, California 94111, concerning his proposed mining activities on the lands in issue.

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